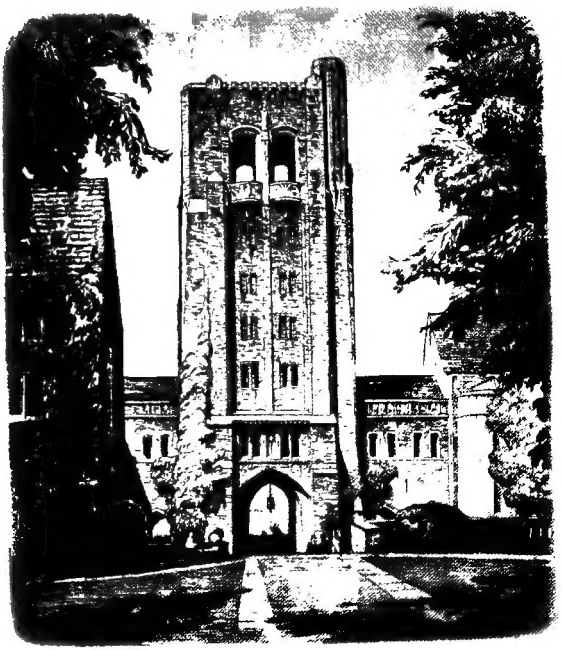


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A TREATISE

ON THE

POWER OF TAXATION

STATE AND FEDERAL

IN THE UNITED STATES

By FREDERICK N. JUDSON
OF THE ST. LOUIS BAR

St. Louis
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PREFACE

It was said, in prefacing the First Edition of this book in 1902, that questions of taxation were then engaging more than ever before the attention of the legislatures and courts, as well as economists. It can be said without fear of contradiction that this is true of the present time to a far greater degree. The necessity of meeting new demands for human betterment in the development of our civilization has caused throughout the states of the Union a pressing demand for new methods in taxation to secure needed revenue; and the pressure of national emergencies in war as well as in peace, has called for the exercise of all the Federal powers of taxation.

The distinction between the taxing power of the State under our complex form of government, and the construction of the statutes in the exercise of that power, is obvious. Our states are sovereign in taxation, subject to the restriction of the Federal Constitution and the limitations growing out of our dual form of government. Under the Fourteenth Amendment the power of the Federal government secures to the citizen due process of law and the equal protection of the laws in the exercise by the State of its sovereign power; so that there is a Federal question whereon Federal jurisdiction may be invoked in every tax case in which these fundamental rights are claimed to be denied by State authority. So great is the diversity in the details of State taxing systems, and so many are the cases involved in their construction and application, that the inclusion of this great volume of accumulated case law on taxation in an intelligent form, with different State constitutions and statutes expounded and applied, as was said in the preface of the First Edition, would now require a publication of encyclopedic proportions.

The limitation of the taxing power of the States under our form of government and under the Constitution of the United States, has been expounded and developed by the Supreme Court

of the United States for more than a century; and the rules formulated by the Court are essentially judge-made law, evolved for the complicated conditions of modern business from the gradually developed conception of the relation of the State to the Federal government. The historical method, therefore, has been followed, presenting the judicial development of these conceptions of the relation of the State to the general government, and liberal use has been made of quotations from opinions of the Supreme Court in formulating and announcing these fundamental rules.

It is the aim of this book to show the limitation of the taxing power of the State and Federal government, so far as these limitations have been declared and expounded by the Supreme Court of the United States; and decisions of the State Court and inferior Federal courts have been cited as implying or illustrating the fundamental limitations thus declared. These decisions declare what the State cannot tax, and thereby show what it can tax. What the State has taxed must be learned from its own statutes and the decisions of its own courts. What the several states are now taxing (the State tax systems now in force), it has been the aim to show in the collocation of State taxing systems in the Appendix. What the State ought to tax is a question for economists and reformers.

The vast increase in the Federal taxing power, illustrated in the recent enactments set forth in the Appendix, called forth by the existing national emergencies, is the most interesting and impressive fact in the development of taxation in our national history. This Federal power is based, not only upon the adoption of the Sixteenth Amendment in 1913, but also on the judicial construction of the original grant of the Constitution. There are indications that the States may in the future avail themselves of the effectiveness of the Federal taxing system by adopting one or more of its features, in remedying the recognized ineffectiveness of the general property tax, which has been the main dependence of the States.

To save unnecessary repetition, the Supreme Court of the United States is mentioned as the Supreme Court only, and is dis-

tinguished from the Supreme Courts of the States, as the titles of the cases cited from the latter include the names of the States.

I take pleasure in acknowledging the efficient assistance of Mr. Eustace C. Wheeler, of the St. Louis Bar, in general revision and in the preparation of the Index.

FREDERICK N. JUDSON.

St. Louis, Oct., 1917.

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THE LAW OF TAXATION

CHAPTER I.

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§ 1. **Taxation and the Constitution of the United States.**—The power to tax has been defined as the power in the State to enforce proportional contributions from persons and property for the support of the government and for all public needs. This power is therefore essential to the existence of an organized political community. In the language of the Supreme Court[1] concerning the power of taxation delegated to Congress by the Constitution:

"The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive."

The original thirteen States, when they became independent Commonwealths after the declaration of independence, exercised this sovereign power of taxation unrestricted by any external authority. It was the absence of this power in the Congress of the Confederation, and its inability to enforce payment by the States of its requisitions upon them, which brought about the failure of the Confederation, and was one of the moving causes in the organization of the Federal Union, under the Constitution of the United States.

This fatal defect in the Articles of Confederation, the inability of Congress to enforce the collection of its revenues, was

[1] Nicol v. Ames, 173 U. S. l. c. 515, 43 L. Ed. 791 (1898).

remedied in the Constitution by giving Congress a power of taxation, exclusive as to imports, and concurrent with the States in internal taxation, dealing directly in both with the subjects of taxation.[1]

§ 2. **The Constitution in Relation to the State and Federal Power of Taxation.**—As the government of the United States, under the Constitution, is one of delegated powers, Congress has only such taxing power as the Constitution delegates to the Federal government; while the States retain their original powers of taxation, subject to the restrictions which the same instrument imposes upon them. Thus the Constitution acts in the one case as a grant, and in the other as a restraint of power. It is true that the original State sovereignty in taxation was never possessed by the States later admitted into the Union, in the same sense as by the original thirteen. But this relation of the States to the Federal government established by the Constitution is assumed without distinction by all the States admitted to the Union, on the same basis as it existed between the original thirteen States and the central government; for, under the Constitution, all the powers not delegated to the United States by the Constitution are reserved to the States respectively, or to the people.[2] It was said by the Supreme Court in a notable case:[3]

"A State in the ordinary sense of the Constitution is a political community of free citizens, occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States un-

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[1] Thus Mr. Hamilton said in the Federalist, No. 16: "The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means and have a right to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular States."

[2] Constitution, Amendment X.

[3] Texas v. White, 7 Wall. l. c. 721, 19 L. Ed. 227 (1869).

der a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it one people and one country."

And again the court said: "Equality of constitutional right and power is the condition of all the States of the Union, old and new."[1] It was decided in that case that the ordinance of 1787, for the government of the Northwestern Territory, and the resolution admitting the State of Illinois into the Union, could not control the powers and authority of the State after her admission, and that on her admission she at once "became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States."

Subject to the restraints imposed by the Constitution, and those growing out of the relations thereby created, the States retain their original taxing power, or more accurately, all the States hold subject to such restrictions the sovereign taxing power, which the original thirteen States exercised prior to the adoption of the Constitution.[2] The constitutional basis of internal taxation in the United States, therefore rests upon the concurrent exercise by two sovereignties of the power of taxation over the same subjects and in the same territory. The exercise by the States of their original power is subject, however, to a further qualification arising out of the supremacy of the Constitution, laws and treaties of the United States, which are made by the Constitution the supreme law of the land.[3]

§ 3. **The Concurrent Powers of Internal Taxation.**—When the Constitution was adopted, or, in the words of John Quincy Adams, "extorted from the grinding necessity of a reluctant people," this grant to the Federal government of a concurrent power over internal taxation was jealously and stoutly resisted. The exclusive jurisdiction of the Federal government over imports and customs duties seems to have been recognized as a

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[1] Escanaba Company v. Chicago, 107 U. S. 678, 27 L. Ed. 442 (1883). See also Huse v. Glover, 119 U. S. 543, 30 L. Ed. 487 (1886).

[2] 1 Story on Cons., Sec. 940.

[3] Art. VI., Sec. 2, of the Constitution.

necessity, but internal taxation, it was claimed, should be left to the States,[1] or the people would be oppressed by an army of Federal tax collectors and crushed by the weight of this double taxation by the State and Federal authority. The Constitution contains no express limitation upon the taxing power of the States except as to imports and exports, and its defenders, notable among them Mr. Hamilton in the Federalist, contended that this left the power of the States over internal taxation unrestrained. Thus he said concerning the supposition that the taxing power of the States was repugnant to that of the Union:[2]

"It cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State, which might render it *inexpedient* that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide and might require reciprocal forbearances. It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty."[3]

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[1] See 2 Thorp's Constitutional History of the United States, Book III, for an interesting account of the arguments for and against the Constitution. See also Federalist, Nos. 30 to 36.

[2] Federalist, No. 32.

[3] Mr. Hamilton in Federalist, No. 36, in answer to the argument that there would be "double sets of officers" for internal taxation, says that probably "the United States will either wholly abstain from the objects preoccupied for local purposes or will make use of the State officers and State regulations for collecting the additional imposition." He intimated also that the expenses of the States would probably be small and that only a small land tax would be required for their purposes after their then outstanding debts were paid. This discussion of the Federalist as to the concurrent power of taxation was used in McCulloch v. Maryland in support of the argument in favor of the power of the State to tax the branch of the National Bank; see reference to same in the opinion of Chief Justice Marshall, *infra*, Sec. 7.

The distinction made by Mr. Hamilton, on the adoption of the Constitution, between questions of "expediency" in the concurrent exercise of the sovereign powers of taxation by the dual sovereignties of the State and Federal government and the "constitutional repugnancy" which precludes the exercise of the power of the States, is of still graver importance under the changed conditions of our own time. The Federal taxing power has been extended to include direct income taxation,[1] and this form of taxation is open to all the States, and is exercised by several.[2] On the other hand, the States have so expanded in number, population and wealth, that the revenues of the smallest now rank with that of the Federal government at the time of the adoption of the Constitution. Furthermore, the public expenditure, both under normal conditions and in public emergencies, are forcing both the Federal and State governments to increase their revenues by taxation of the same property and business, which is subject to these dual sovereignties.

While the "expediency" referred to by Mr. Hamilton, is necessarily remitted to those who are charged with the responsibility of exercising these sovereign powers, it is necessary to consider the cases of "constitutional repugnancy" which now, as heretofore, "extinguish the pre-existing right of sovereignty" in the State.[3]

§ 4. **Judicial Construction of Federal Taxing Power.—The** attention of the fathers in framing the Constitution was therefore not directed to the restraint upon the taxing power of the States growing out of the relations between the States and the Federal government, for no one then foresaw the tremendous expansion of the national commerce and of the functions of the Federal government, but their attention was directed to restraints upon the Federal taxing power. This jealousy of the Federal government occasioned the only express restrictions upon its tax-

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[1] See *infra*, Sec. 561.

[2] See *infra*, appendix, Massachusetts, Mississippi, Missouri, Oklahoma, South Carolina, Virginia and Wisconsin.

[3] For the inherent limitation of the Federal taxing power over State agencies, see *infra*, Sec. 579.

ing power, to-wit, the provision that direct taxes shall be apportioned according to population, the requirement of uniformity as to all duties, imposts and excises, and the prohibition of a tax upon exports from any State, or any preference between ports of the States.[1]

After more than a century of government under the Constitution, the Supreme Court was unable, at least at the time, to agree upon a construction of any one of these three restrictions. It was decided by a bare majority of five to four that the term "direct taxes" did not mean what it had been construed to mean during the one hundred years since the foundation of the government;[2] while upon the application of the uniformity requirement in Federal taxation to the territorial insular acquisitions of the country, the judges were unable to agree upon any opinion;[3] and only by a majority of one, as in the Income Tax Case, was a decision rendered as to what was a duty upon exports or a preference between ports with reference to these same territorial acquisitions.[4] This inability of the eminent jurists of the Supreme Court to agree in the construction and application of these provisions of the Constitution forcibly illustrates not only the complexity inherent in the adjustment of the concurrent taxing powers of dual sovereignties, but in a broader sense the inadequacy of a written constitution when confronted with conditions and emergencies never contemplated by its framers.

§ 5. **Restraints Upon State Taxation Developed By Judicial Construction.**—While the taxing power of the States is thus unrestrained by any express constitutional restrictions, except such as are involved in the exclusive power over foreign commerce and concurrent power in internal taxation given to Congress, there is a very important restraint arising out of the necessary relations between the State and the Federal government created by the Constitution, and the supremacy of the

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[1] See Constitution, Art. I., Secs. 8 and 9.

[2] Income Tax Cases, 157 U. S. 429, 39 L. Ed. 759 (1895); 158 U. S. 601; 39 L. Ed. 1108 (1895).

[3] Downes v. Bidwell, 183 U. S. 244, 45 L. Ed. 1088 (1901).

[4] Dooley v. United States, 183 U. S. 151, 46 L. Ed. 128 (1901).

Federal power which the Constitution established. Thus it is provided:[1]

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

There is no provision in the Federal Constitution prohibiting State taxation of Federal agencies or franchises, or interstate commerce, or protecting from taxation property exempted by contracts of the State legislatures; but neither is there any express provision in the Constitution whereunder the Federal Supreme Court can declare an Act of Congress or of a State legislature void as violating that instrument, and it is said that foreigners have searched the Constitution in vain to find a recognition of this power.[2] It has in fact been developed by judicial construction from the necessary relation between the legislative power and the court created by the written Constitution.[3]

Thus also by judicial construction from the necessary relation between the power of State taxation and the supremacy of the Federal authority, the great volume of the law of Federal restraints upon State taxation has been developed upon the fundamental principle of the supremacy of the Federal authority, as expounded by the great constructive mind and the masterful reasoning of Chief Justice Marshall.

§ 6. **Importance of Decision in McCulloch v. Maryland.**—The decision in McCulloch v. Maryland,[4] decided in 1819, is the foundation of the great principle of Federal supremacy in taxation, which necessarily involves the exemption from State taxation of the agencies of the Federal government. The question before the court was the validity of a statute of Maryland requiring the notes of the branch of the United States Bank established in that State to be issued upon stamped paper, sub-

1. Art. VI., Sec. 2, of the Constitution.
2. See 1 Bryce's American Commonwealth, 346.
3. Marbury v. Madison, 1 Cranch 110, 2 L. Ed. 60 (1803).
4. 4 Wheaton 316, 4 L. Ed. 579.

ject to a stamp tax levied by the State. There was thus at issue not only the constitutional power of Congress to establish the bank and of the bank to establish its branches, but also the power of the State to tax such branches. It was the first case presented to the court, involving the powers impliedly given by the Constitution and the Federal limitations upon the taxing power of the State growing out of the relations between the States and the Federal government created by the Constitution. Counsel for the State of Maryland argued that the principle of concurrent powers in internal taxation, as expounded by the writers in the Federalist, carried with it the right on the part of the States to tax the agencies of the Federal government, and on the part of the Federal government to tax the agencies of the States.

The opinion of Chief Justice Marshall is justly deemed one of the greatest, if not the greatest, of that great jurist, as it certainly is the most far-reaching in its consequences, dealing as it does with the limitations of the sovereign power of both Federal and State governments. It is notable, as are others of his opinions, in that it cites no authorities, for there were none to cite.[1]

§ 7. **Opinion in McCulloch v. Maryland.**—After holding that Congress had the constitutional power to establish the bank, and the bank the right to establish its branch in the State, it was held further that the State, within which the branch was located, could not, without violating the Constitution, tax that branch. The State government had no right to tax any of the constitutional means employed by the government to execute its constitutional powers, and no power by taxation or otherwise to

[1] The report says: "This case involving a constitutional question of great public importance, and the sovereign rights of the United States and the State of Maryland, and the government of the United States having directed their Attorney-General to appear for the plaintiff in error, the court dispensed with its general rule, permitting only two counsel to argue for each party." The case was argued by Mr. Webster, Mr. Pinckney and Attorney-General Wirt for the United States Bank, and by Mr. Hopkinson, Mr. Jones and Attorney-General Martin for the State.

retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government. Thus Chief Justice Marshall said:

"That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power is admitted."

After conceding that there was no express prohibition of such a tax in the Constitution, it was said:

"There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds."

And further, page 431:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. . . . If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . . The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

Reference was made in the opinion to the arguments of the Federalist, and it was held that they were intended to prove the fallacy of apprehensions of an unlimited power of taxation. It was said:

"Had the authors of these excellent essays been asked, whether they contended for that construction of the Constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit that their answer must have been in the negative."

It was said further that the right of the State to tax the banks chartered by the general government was not the same as the right of the national government to tax the banks chartered by the State:

"The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

The opinion concluded as follows, pp. 436, 437:

"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

"We are unanimously of the opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

"This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

§ 8. **Osborn v. United States.**—A few years later, in 1824, the court was asked[1] to reconsider so much of this opinion as held that the States had no rightful power to tax the banks of the United States. It was contended that banking is a private business, the essential character of which was not changed by the fact that the parties engaging therein were incorporated under the Act of Congress, and it was therefore not properly an instrumentality of the government in the sense that the mint or post office was. But the court replied that while banking was a private business, the Bank of the United States was not created for its own sake or for private purposes, and to tax its facilities, its trade and occupation, was to tax the bank itself. The tax in this case was one levied by the State of Ohio taxing the banks of the United States fifty dollars on each office of discount and deposit in the State. The court said, l. c., p. 867:

"Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of McCulloch v. Maryland, and is of opinion that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States made in pursuance of the Constitution, and therefore void."

§ 9. **Brown v. Maryland.**—This principle of Federal supremacy in relation to the taxing power of the States was again emphatically stated in 1827, in the great case of Brown v. Maryland.[2] In answer to the argument that the construction given by the court to the power to regulate commerce would abridge the power of the State to tax its own citizens or their property within its territory, the court (Chief Justice Marshall) said, p. 448:

"We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been

[1] Osborn v. Bank of the United States, 9 Wheaton 738, 6 L. Ed. 204.
[2] 12 Wheaton 419, 6 L. Ed. 678.

observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation. It results necessarily from this principle that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce."

§ 10. **United States Securities Not Taxable By States.**—This principle was first applied to the attempted State taxation of Federal securities in 1829, in Weston v. Charleston.[1]

The city of Charleston passed an ordinance, taxing, with other personal effects, the six and seven per cent stock of the United States, 25 cents on every $100. This tax having been sustained by the State courts, was taken to the Supreme Court of the United States and there adjudged unconstitutional. It was claimed that a tax on stock came within the exception stated in the case of McCulloch v. Maryland, but the court held the contrary, saying, l. c., p. 468:

"The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised."[2]

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[1] 2 Peters 450, 7 L. Ed. 481.

[2] Justices Johnson and Thompson dissented, the former saying, l. c. p. 473: "Why should not the stock of the United States, when it becomes mixed up with the capital of its citizens, become subject to taxation in common with other capital? Or why should one who enjoys all the advantages of a society purchase at a heavy expense and lives in affluence upon an income derived exclusively from interest on governmental stock, be exempted from taxation?"

§ 11. **Legal Tender Notes, Etc., Made Taxable By Act of Congress.**—The principle thus established was applied to certificates of indebtedness issued by the United States to creditors of the government for supplies furnished to aid in carrying on the Civil War;[1] also to the United States notes, that is, treasury notes or greenbacks constituting the circulating medium of the country, as these were held to be engagements to pay dollars and therefore obligations of the national government and exempt from State taxation.[2] Gold and silver certificates issued by the government,[3] and the notes issued by national banks, organized under Act of Congress, were also held thus exempt.[4] But this exemption of national bank notes and United States legal tender notes and certificates of the United States, circulating as currency, was repealed by Act of Congress in 1894.[5]

§ 12. **Bonds of District of Columbia Exempted.**—Bonds issued by the District of Columbia under authority of Congress, which were to be paid in part by taxation of property within the District and in part by appropriations of Congress, were held to be lawfully exempted by Congress from taxation by State or municipal authority.[6] It was contended that Congress had no power to declare this exemption. But the Circuit Court of Ap-

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[1] The Banks v. The Mayor, 7 Wall. 16, 19 L. Ed. 57 (1869).

[2] Bank v. Supervisors, 7 Wall. 26, 19 L. Ed. 60 (1869).

[3] State v. Mayor, 63 N. J. L. 547.

[4] See Horn v. Green, 52 Miss. 452; but *contra* Montgomery County Commissioners v. Elston, 32 Ind. 27; Ruffin v. B. of Com., 69 N. C. 498.

[5] Act of August 13, 1894, providing "that circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency and gold, silver or other coin, shall be subject to taxation as money on hand or on deposit, under the laws of any State or Territory: *Provided*, that any such taxation shall be exercised in the same manner and at the same rate that any such State or Territory shall tax money or currency circulating as money within its jurisdiction." It was also provided that the act should not change the laws relating to the taxation of national bank shares. See *infra*, Sec 281.

[6] Grether v. Wright, 23 C. C. A. 498, 75 Fed. 742 (1896).

peals (6th Cir.) held, in an interesting opinion by Judge Taft, after careful review of the authorities, that where Congress lawfully directs the issue of evidences of indebtedness in the exercise of any power derived by it from the Constitution, whether it be by virtue of the power to borrow money on the credit of the United States, or any other grant, such evidences of debt are exempt from State taxation, or at least may be exempted therefrom, if Congress sees fit to give them this quality. The suit was upon municipal bonds issued to borrow money to pay the debts incurred in improving and beautifying the city of Washington, the capital of the nation. The court said that the bonds, so authorized by Congress, were issued for an essentially national purpose, and that in effecting that purpose by means of the express constitutional power to borrow money on the credit of the United States, the legislative power of Congress in thus exempting them was as territorially extensive as the exercise of the power for any other constitutional purpose. Hence it operated in each State upon the taxing officers of the State and upon the government thereof, and expressly forbade the taxation of the bonds.

§ 13. **The Exemption as Dependent Upon the Relation of the Obligations to the Government.**—It has been customary in acts authorizing the issue of obligations of the United States to declare such securities exempt from State taxation, but such statutory enactment is not the real foundation of the exemption, which grows out of the character of the securities and their relation to the national government, and does not rest upon any specific declaration in the act authorizing their issue.

This was illustrated in the decision of the Supreme Court that United States treasury checks or orders issued for interest accrued upon registered bonds of the United States, where the intent was for immediate payment, may be taxed by the State. The court said these checks were obligations of the United States and were not intended to circulate as money, and therefore did not fall within the letter of the statute, R. S. Sec. 3701, but they did fall within its spirit and were proper subjects of taxation, as they were intended for immediate payment and had no rela-

tion to the performance of the functions of the government.[1]

On the other hand the bonds issued by municipalities in the territory of Oklahoma were held to be so issued in the performance of a governmental function, and it was immaterial that these bonds were not guaranteed by the United States or even by the central government of the territory, nor were they declared to be exempt by any governmental authority, but they were held by the court to be exempt because they were in effect the obligations of the territorial government and therefore governmental agencies of the United States.[2] It seems in this case that at the time of the assessment the territory had ceased to exist, but as the obligations of the municipalities of the territory were assumed by the State of Oklahoma, the court said that this was immaterial. In this case the inclusion of these bonds in the computation of the assets of a Minnesota savings bank for taxation was held unlawful.

While securities issued by the national government, or in the performance of a governmental function, under national authority, are thus exempt from State taxation by reason of their character and their relation to the national government, without any specific designation of such exemption,[3] it is also true that Congress has the authority to declare such securities subject, not only to State, but to Federal taxation, which is, therefore, really dependent upon the will of Congress, and this will must be declared, to make what is judicially exempt, subject to taxation. Thus, the national authority has been exercised in making Federal securities subject to State taxation in the case of legal tender notes. See *infra*, Sec. 11.

§ 14. **Salaries of United States Officials Not Taxable.**—In 1842 the same principle of exemption was applied by the Supreme Court to the case of an officer of the United States in Dobbins v.

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1 Hibernia Savings & Loan Society v. San Francisco, 200 U. S. 310, 50 L. Ed. 495, affirming 159 Cal. 205 (1906).

2 Farmers & M. Savings Bank v. Minnesota, 232 U. S. 516, 58 L. Ed. 706 (1914).

3 Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845 (1886).

Erie County.[1] The State of Pennsylvania assessed a tax on all offices and posts of profit, and the attempt was made to collect it from the captain of a United States revenue cutter at the station on Lake Erie. The Supreme Court of Pennsylvania sustained this tax and distinguished the case from Weston v. Charleston and McCulloch v. Maryland, on the ground that the officer was a taxable person. But the Supreme Court of the United States, in an opinion by Justice Wayne, held that there was no distinction. The affairs of the national government are necessarily carried on by agents who must be compensated, and if the State could tax the salaries of such agents, it would in effect give the State a revenue out of the United States and would reduce the compensation fixed by the United States to below what it adjudged was reasonable for the service.

§ 15. **State Tax Upon Passengers in Mail Coaches Invalid.** —The Cumberland road was constructed by the Federal government through the States of Maryland, Virginia, Pennsylvania and Ohio. Acts were passed by the several States, and accepted by the United States, providing that no toll should be received or collected from any wagon or carriage employed with the property of the United States, or any cannon or military store belonging to the United States. It was held that wherever a carriage carried the mail upon this road, although it carried other property and passengers also, it must be considered to be laden with the property of the United States and therefore exempted from payment of State toll.[2]

The regulation of the Post Office Department required the coaches to carry passengers for the security of the mails. A toll of four cents imposed by the State of Maryland upon every passenger for every space of ten miles in the passenger or mail coaches was adjudged inconsistent with the compact made with the United States.[3]

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[1] 16 Peters 435, and 10 Ed. 1022. See also Ulsh v. Perry County, 7 Pa. Dist. Rep. 488, holding the act of Pennsylvania of April 15, 1834, taxing a postal clerk, invalid.

[2] Searight v. Stokes, 3 Howard 151, 11 L. Ed. 537; Neil v. Ohio, 3 Howard 720, 11 L. Ed. 800 (1844).

[3] Achison v. Huddleson, 12 Howard 293, and 13 L. Ed. 993 (1850).

§ 16. **Taxation of Banks Holding United States Securities Invalid.**—In Bank of Commerce v. New York City, decided in 1862,[1] the principle that Federal securities are exempt from State taxation, laid down in Weston v. Charleston, was extended to banks organized under the laws of New York, a part of whose stock was invested in Federal securities. The capital of the bank was then taxed upon a valuation like the property of individuals, and the court held that the case was controlled by the principle of the Weston case. The tax was therefore adjudged invalid so far as the property of the corporation was invested in United States securities. Subsequent to this decision, the State of New York enacted another statute that all banks should be subject to taxation on a valuation equal to the amount of their capital stock paid in, or subject to be paid in, and their surplus earnings, and it was held by the New York Court of Appeals that this did not impose a tax upon the United States securities in which some of the banks had invested all and others a part of their capital. But the Supreme Court[2] held that the tax was still upon the Federal securities; that the tax on the capital and surplus was a tax on the property of the bank, and, therefore, upon the securities in which that property was invested; that it was not upon the franchise of banking or privilege of doing a banking business, but upon the property of the bank, *i. e.*, upon the capital representing its property.

This distinction between a tax upon shareholders and one upon corporate property, although established over dissent, said the Supreme Court, had come to be inextricably mingled with all taxing systems and could not be disregarded without bringing them into confusion. A State, therefore, cannot tax the property of a bank by adopting the value of the shares as the measure of the taxable valuation of the property, unless it allows a deduction from such valuation on account of bonds of the United States owned by the banks.

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[1] 2 Black 620, 17 L. Ed. 451 (1862.)

[2] Bank Tax Case, 2 Wallace 200, 17 L. Ed. 743 (1865).

[3] Home Savings Bank v. Des Moines, 51 L. Ed. 901, 205 U. S. 503 (1907), reversing (Iowa) 101 N. W. 867.

§ 17. **Corporate Franchise Tax Distinguished from Property Tax.**—But it was later decided in a series of cases reported in the 6th Wallace that, where the State tax was upon the State corporate franchise, and not upon the property of the corporation or upon the stock as representing the property, the tax was not invalidated by reason of the investment of the property of the corporation in exempted Federal securities. This principle was applied to a statute of Connecticut, providing that savings banks should pay a tax of three-fourths of one per cent on their deposits;[1] to a Massachusetts tax which was levied on the average amount of deposits during a period of six months;[2] and to a Massachusetts corporation tax[3] which required all corporations having a capital stock divided into shares to pay a tax of a certain percentage upon the excess of the cash market value of their stock over and above the value of their real estate and machinery. In this last case the tax was held valid, although the surplus capital of the corporation was invested in exempted Federal securities.

This distinction was again brought before the court in the case of a New York statute which levied a tax upon the "corporate franchise or business" of a company, at the rate of one-quarter of a mill upon the capital stock for each one per cent of dividend of six per cent or over; also eight-tenths of one per cent upon the premiums of fire and marine insurance companies. A fire insurance company claimed that it was entitled to a deduction of that portion of its capital invested in bonds of the United States. This contention was overruled by the New York Court of Appeals,[4] and its judgment was at first affirmed in the United States Supreme Court by a divided court.[5] A rehearing

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[1] Society for Savings v. Coite, 6 Wallace 594, 18 L. Ed. 897 (1868).

[2] Provident Institution v. Massachusetts, 6 Wallace 611, 18 L. Ed. 907 (1868).

[3] Hamilton Company v. Massachusetts, 6 Wallace 632, 18 L. Ed. 904 (1868). Chief Justice Chase and Justices Grier and Miller dissented in these cases.

[4] 92 New York, 328.

[5] Home Ins. Co. v. N. Y., 119 U. S. 129, 30 L. Ed. 350 (1886).

was granted, the case reargued and the judgment again affirmed.[1]

The court held that the tax was not levied upon the capital stock nor upon the bonds of the United States composing a part of the stock, and that it was properly designated as one upon the corporate franchise or business.

§ 18. **A Taxable Corporate Franchise Defined.**—The court in this case defined a taxable corporate "franchise or business" as the right to be a corporation, that is, to act in a corporate capacity with right of succession, and limitation of personal liability as distinguished from the privileges or franchises which, when incorporated, the company may exercise. The court said that such a corporate privilege was valuable, and the State had a right to impose conditions, and determine the amount of the tax thereon by such mode as it might select, and its action was not the subject of review.

The State franchise which is thus subject to taxation, even if the corporation owns Federal securities, is to be distinguished from the Federal franchises granted by Congress, see *infra,* Sec. 30, which are not the subject of State taxation unless with the consent of Congress.

§ 19. **Taxation of Shares of Corporations Holding Federal Securities.**—As will be hereafter seen, *infra,* Sec. 291, it was held in the case of the national banks, that as the act of Congress under which they were incorporated authorized the taxation of their shares, it is immaterial that their capital is partially or wholly invested in United States bonds, as the tax is upon the individual shares and not upon the capital or property of the bank as such. This distinction, or rather the judicial recognition of the fiction distinguishing the property of the shareholders from the property of the corporation, has also been applied by the court, as will be hereafter seen, in reference to contracts of exemption from taxation, see *infra,* Sec. 103.

It would seem that the same principle would be applicable to

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[1] Home Ins. Co. v. N. Y., 134 U. S. 594, 33 L. Ed. 1025. Justices Miller and Harlan dissenting.

the case of any Federal securities or rights of property granted by the United States, as in the case of patent rights, *infra*, Sec. 36, and that the tax is valid if levied upon the corporate shares, or as a franchise tax upon the corporation. A ready means of taxing United States securities is thus afforded, by naming the tax as one upon the franchise of the company, or upon the corporate shares, instead of upon the property or capital of the corporation, although in fact the tax, whatever it is called, is upon substantially the same property, in both cases.

§ 20. **State Tax Upon Interstate Passengers Invalid.**—In Crandall v. Nevada,[1] the court adjudged invalid a capitation tax levied by the defendant of one dollar upon every person leaving the State by any railroad, stage coach or other carrier, to be paid by the corporations or persons carrying the passengers. The court, in an opinion by Justice Miller, expressed regret that such a question should be submitted with no brief or argument on the part of the plaintiff in error, and said that the case was one of importance, for it involved the right of the State to levy a tax upon persons residing within its jurisdiction who might wish to go out of it, and upon persons residing out of it who might have occasion to pass through it. The statute was adjudged void, not because it was a violation of any specific clause of the Constitution, although two of the judges based their concurrence on the ground that it was an attempted regulation of commerce, but because it was a tax inconsistent with the relations of the State to the Federal government. The United States, as incident to the power to prosecute and declare war, has a right to raise and transport troops through and over the territory of any State of the Union. The citizens of each State have a right to visit the seat of government, to have free access to the seaports of the country and so on, and this right is independent of the law of any State over whose soil they must pass in the exercise of it.

§ 21. **Lands and Other Property of United States Not Taxable By States.**—It may be said in general terms that all the

[1] 6 Wallace 35, 18 L. Ed. 744 (1868).

property of the United States held for Federal purposes, as for public buildings or reservations, including the public domain, is exempt from State taxation.[1] But this exemption no longer exists when the right to a conveyance is secured by certificate of entry or purchase, even though no patent has been issued.[2] The equitable title must, however, be fully vested without any more to be paid or any act to be done going to the foundation of the right, before the lands can become taxable.[3] Until a Spanish grant has been segregated from the public domain by survey properly approved, it is not subject to taxation by State authority.[4]

This subject of the exemption of property of the United States from State taxation was fully discussed in Van Brocklin v. State of Tennessee.[5] Lands within the confines of defendant

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[1] Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 745 (1886).

[2] Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 339 (1867); Carroll v. Safford, 3 Howard 441, 11 L. Ed. 671 (1845); Railway Co. v. Prescott, 16 Wallace 603, 21 L. Ed. 373 (1873).

In Bothwell v. Bingham County, 237 U. S. 642, 59 L. Ed. 1157 (1915), affirming 24 Idaho 125, held that proceedings for the acquisition of title to arid lands under the Carey Act of August 18, 1894, and the Amendatory Acts of June 11, 1896, and March 3, 1901, have reached the point where the land may be taxed by the state when nothing remains to be done by the entryman in order to entitle him to a patent, and the United States has no longer any beneficial interest in the land, having patented the same to the state, though the state has not yet issued a patent to the entryman.

See also Sargeant v. Herrick, 221 U. S. 404, 55 L. Ed. 1787 (1911), reversing 140 Iowa 590, holding that the location of a military bounty land warrant, under the Act of March 3, 1855, did not operate as a payment of the purchase price which was essential to the right to a patent.

As to segregation of lands in Spanish Grant in Florida from public domain by location and survey, so as to be subject to taxing jurisdiction of state, the survey though not approved by Commissioner of General Land office being made foundation of patent subsequently issued, see Wilson Cypress Co. v. Del Cozo Y. Macos, 236 U. S. 635, 59 L. Ed. 758, reversing 202 Fed. 742.

[3] Railway Co. v. Prescott, *supra;* Wisconsin Central Railroad Co. v. Price County, 133 U. S. 496, 33 L. Ed. 687 (1890), reversing 64 Wis. 579.

[4] Robertson v. Sewell, 31 C. C. A. 107, 87 Fed. 536 (5th Cir.) (1898).

[5] *Supra.*

purchased by the Federal government at a sale for direct taxes levied by it in 1862, and afterwards sold by it or redeemed by the former owner, were exempt from State taxation while held by the United States.[1] The court says in its opinion that the necessity for exempting all the property of the United States from State taxation has been recognized by the highest courts of several of the States, and also in the statutes of most of them. It remarked, however, that such a provision in the laws is not the foundation of the exemption, but is inserted only from abundant caution and because the assessment of taxes is to be made by local officers skilled in the valuation of property, but ignorant of legal distinctions.[2] The general principle is thus laid down at pp. 174 and 175:

"In short, under a republican form of government, the whole property of the State is owned and held by the State for public uses, and is not taxable, unless the State which owns and holds it for those uses clearly enacts that it shall share the burden of taxation with other property within its jurisdiction. Whether the property of one of the States of the Union is taxable under the laws of that State depends upon the intention of the State as manifested by those laws. But whether the property of the United States shall be taxed under the laws of a State depends upon the will of its owner, the United States, and no State can tax the property of the United States without their consent."

And the general power of the United States in the acquisition of lands in a State is thus stated at p. 154:

"So the United States, at the discretion of Congress, may acquire and hold real property in any State, whenever such property is needed for the use of the government in the execution of any of its powers, whether for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks or hospitals, or for any other of the many public purposes for which such property is used; and when the property cannot be acquired by voluntary arrangement with the owners, it may be taken against their will, by the United States, in the exercise of the power of eminent

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[1] But after sale under a confiscation, the lands are subject to State taxation, see Newby v. Brownlee, 23 Fed. 320.

[2] P. 171, where there is a statement of the express exemption of property of the United States in the general tax acts of each State.

domain, upon making just compensation, with or without a concurrent act of the State in which the land is situated.[1]

§ 22. **Limitations of Exemption of U. S. Lands, Etc.**—But the extent of the exemption of lands in a State acquired by the United States may be limited by inserting terms in the cession by the former which the latter agrees to. Thus in a grant by Kansas of the Fort Leavenworth military reservation to the United States, the State reserved the right to tax the railroads, bridges and other corporations within the territory ceded, and it was held that this right could be enforced against the property and franchises of a railroad company within the reservation.[2]

Where land was acquired by the United States for the erection of a post office in Kansas City, Missouri, it was held that the moment the government acquired the property, its jurisdiction over it became absolute and exclusive, and there was no power thereafter to enforce the lien for taxes which theretofore had attached under the State laws.[3] So the exemption of land from taxation continues during the interim between the filing of an original land warrant and the filing of a substitute warrant issued in place of the original, canceled on account of forgery in the assignment.[4]

§ 23. **Lands Granted to Railroads, When Taxable.**—Where a railroad land grant was made by Congress, providing that the land should not be conveyed to the company until the United States treasury was paid the cost of surveying, selecting and conveying the same, it was held by the Supreme Court that this exempted the lands from State or territorial taxation until the required payment was made. The court said it was aware that the company might take advantage of this principle and neglect to pay the costs in order to avoid taxation, but that the remedy was with Congress.[5] Congress thereupon passed the Act of

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[1] Chappell v. United States, 160 U. S. 499, 40 L. Ed. 510 (1896).

[2] Ft. Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 29 L. Ed. 264 (1885).

[3] Bannon v. Burns, 39 Fed. 892; Cir. Ct. W. Dist. of Mo.

[4] Pitts v. Clay, 27 Fed. 635; U. S. Cir. Ct. Nor. D. Iowa.

[5] Nor. Pac. R. R. Co. v. Traill County, 115 U. S. 600, 29 L. Ed. 477 (1885); Railway Co. v. McShane, 22 Wall. 444, 22 L. Ed. 747 (1875).

July 10, 1886, providing that surveyed but unpatented lands on which the costs of survey had not been paid, included in railroad land grants, should be subject to State taxation. [1]

Where public lands are granted to a State by Congress to aid in the construction of a railway, the grantee cannot tax the lands while it holds them as trustee for the United States, but they can be taxed after they have been sold within the meaning of the Act of Congress. [2]

§ 24. **The Title Essential for State Taxation.**—Lands granted to railroads by the United States become taxable when the equitable title of the company is perfected by its compliance with the requirements of the statute, which are the conditions precedent to its right to a patent, whether the costs of survey have been paid or not. [3] Thus, it was decided that the possessory claim of the Central Pacific Railroad to its land grant in the State of Nevada was subject to taxation, notwithstanding the fact that the lands might thereafter be determined to be mineral lands, and so excluded from the operation of the railroad grant. As long as the company asserted a possessory claim to the lands, a corresponding obligation was implied to pay the taxes upon them. The court further decided that, where a State statute defined the term "real estate," as including any possessory right or claim in the land, and accordingly listed such right or claim for taxation, this involved no Federal question, since it appeared that express authority had been given by Congress to tax the lands.

The court said in another case that the right of the State to tax was not defeated by the fact that there was a controversy about the character of some of the lands. If there is an uncertainty it must be resolved by the railroad. [4] The fact that the

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[1] Cen. Pac. R. R. Co. v. Nevada, 162 U. S. 512, 40 L. Ed. 1057 (1896), affirming 30 Pac. 686.

[2] Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805 (1875). See also Hunnewell v. Cass Co., 22 Wall. 464, 22 L. Ed. 752.

[3] Central Pac. R. R. Co. v. Nevada, 162 U. S. 512, 40 L. Ed. 903, Justice Field dissenting. U. S. v. Canyon County, 232 Fed. 985 (1916).

[4] Northern Pac. R. R. Co. v. Myers, 172 U. S. 589, 43 L. Ed. 564, Justices Brewer, White, Shiras and Peckham dissenting.

mineral lands have been reserved to the United States does not prevent the vesting of title in other lands, and the latter become taxable notwithstanding the reservation. The reports of the United States surveyors that lands are agricultural and not mineral is sufficient, as there must be a time for determining once for all what lands are mineral. The court held that the term "mineral lands" in such a reservation meant lands known to be such at the time the company acquired its title.[1]

Lands which have not been officially surveyed by the United States, are not, as a rule, taxable; and such a survey is not completed until it has been accepted by the Land Department of the United States.[2]

Government land, as to which all conditions precedent to transfer of title have been performed, is subject to taxation by the State to a purchaser, although the legal title still remains in the government and although the government may claim that the title of a purchaser should be forfeited for failure to perform conditions subsequent. It has been held that the fact that such a claim is pending between the government, and the purchaser is not sufficient to defeat the tax on the ground that the government has such an interest in the land so as to exempt the same from taxation.[3]

§ 25. **Taxability of Mining Claims.**—A statute of Colorado authorizing the taxing of mining claims, whether patented, or entered for patent, or not, and authorizing a sale of the claim in case of failure to pay the tax, and that such a sale should pass title to the purchaser, was valid, although the Enabling Act, admitting Colorado as a State, provided that no taxes should ever be imposed upon such lands or property of the United States.[4]

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[1] Northern Pac. R. Co. v. Walker, 47 Fed. Rep. 681; Davis v. Weidbolt, 139 U. S. 507, 35 L. Ed. 238; Northern Pac. R. R. v. Wright, 4 C. C. A. 193.

[2] Clearwater Timber Co. v. Schoshone County, 155 Fed. 612 (1855).

[3] U. S. v. Southern Oregon Co., 196 Fed. 423 (1912); Cir. Ct. Dist. of Oregon.

[4] Elder v. Wood, 208 U. S. 226, 52 L. Ed. 464 (1908), affirming 37 Colo. 174.

The tax deed conveyed merely the right of possession and affected no interest of the United States. The court said that the land was not assessed, but the claim itself, that is, the right of possession for mining purposes. Such an interest from early times has been held to be properly distinct from the land itself, vendable, inheritable and taxable. The court held that in the tax sale of this claim there had been no violation of any federal right.

§ 26. **The Taxability of Ores and Other Output of Indian Lands.**—Although the title to mineral lands may remain in the United States, the ores, when dug or extracted under a mining claim, are free from any claim or title of the United States, and as personal property they are subject to State taxation in like manner as other personal property. This was ruled in relation to the mining laws of Nevada of 1871, taxing mining ores.[1]

The revenue tax imposed by Oklahoma (Act of May 26, 1908, Sec. 6) upon coal miners or producers equal to a specified percentage of the gross receipts from the total coal produced, which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon such mining property and the appurtenances thereunto belonging, was an occupation or privilege tax, which could not be exacted from a Federal instrumentality acting under Congressional authority, such as the corporate lessee under the authority of the Curtis Act of June 28, 1898, of coal mines upon segregated and unalloted lands belonging to the Choctaw and Chickasaw Indian tribes.[2]

A State when assessing for taxation the corporate assignee of an oil and gas lease of Osage lands made under the authority of the Act of February 28, 1891, and extended by the Act of March 3, 1905, which recognized the assignment may not include in such assessment the lease and rights thereunder either as

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[1] Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313 (1877).

[2] Choctaw, Etc., R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234 (1913).

separate objects of taxation or as represented or valued by the stock of the corporation.[1]

§ 27. **Indian Reservations Not Taxable.**—The Indians have been dealt with by the government from its early history as a dependent people, and the land grants made to them under treaties with their tribes and thereafter allotted to individual Indians are exempt from State taxation, as long as the United States has an interest legal or equitable in the lands or is charged with the performance of some obligation or duty respecting the same.[2]

A state has no right to tax lands held in severalty by individual Indians under patents issued to them by virtue of treaties made with their tribes.[3]

The fact that the primitive habits and customs of the tribe have been largely broken into by their intercourse with the whites, does not authorize the State government to regard the Indians as subject to its laws. Where lands are exempt from levy, sale and forfeiture, they are exempt from ordinary proceedings for the collection of taxes. The Indian Reservations reserved to the Indians in their tribal relations by the United States, cannot be taxed by the State. Thus it was held in the case of the New York Indians,[4] reversing the New York Court of Appeals, that the State had no power to tax the land of the Indians, their ancient and native home, the enjoyment of which had been secured to them by treaty with the Federal government, with the assurance that the lands should remain theirs until they chose

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[1] Indian Territory, Etc., Oil Co. v. State of Oklahoma, 240 U. S. 522, 60 L. Ed. 779 (1916), reversing 43 Okla. 307; M. K. & L. R. R. Co. v. Meyer, 204 Fed. 140.

The claim that cattle owned by a Jesuit society grazing on Indian lands were exempt from taxation was held to be too clearly lacking in merit to convey jurisdiction upon the court. Montana Catholic Missions v. Missoula County, 200 U. S. 119, 50 L. Ed. 398 (1906).

[2] U. S. v. Hemmer, Dist. Ct. of So. Dak. 195 Fed. 790 (1912).

[3] Case of the Kansas Indians, 5 Wall. 737, 18 L. Ed. 667 (1867).

[4] 5 Wallace 761, 18 L. Ed. 708 (1867).

to sell them. And where the Indians, under an arrangement approved by the United States, agreed to sell their lands to private citizens and to give possession after a term of years, the taxation of the land before the end of that term was premature. A sale of land in an Indian Reservation for State taxes is void.[1] But the exemption ceases after the Indian alienates his land to a citizen.[2]

This exemption from State taxation, however, does not exist where inconsistent with the terms of a treaty of the United States with the tribe. This was held in the case of a half-blood member of a tribe who was not a member of a tribal organization existing in the State as a distinct political community, and who had received patents from the United States for lands in fee simple.[3]

The lands allotted to Indians inalienable for certain periods of time during which they are held in trust by the United States for the benefit of the allottees and their heirs are exempt from State taxation, because they are instrumentalities lawfully employed by the nation in the exercise of its powers of government to protect, support and instruct the Indians, and the proceeds of the sale of such lands by Indian heirs of the allottees, which were deposited by direction of the Secretary of the Interior in a bank selected by the Commissioner of Indian affairs subject to their checks were approved by the agent or officer in charge, were held in trust by the United States for the same purpose as were the lands and were exempt for the same reason, as no change of form of property defeated a trust. The court said that this exemption continued both as to lands and the proceeds as long as they were held or controlled by the United States, as the trust had not expired.[4]

This exemption has been held to extend also to the personal property issued by the government to Indians, even after their

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[1] Swope v. Purdy, 1 Dillon 350.

[2] Peck v. Miami County, 4 Dillon 371.

[3] Pennock v. Commissioners, 103 U. S. 44, 26 L. Ed. 367 (1880).

[4] U. S. v. Thurston County, Neb., 143 Fed. 287, reversing 140 Fed. 456 (1906).

citizenship had been conferred upon the allottees, as the property was held in trust for their benefit.[1]

As the exemption of Indian lands is dependent upon the treaty provisions and other congressional legislation, Congress can provide when and on what lands allotted to Indians should be taxable by the State law, or alienable.[2]

§ 28. **Cattle, Etc., of Non-Indians on Indian Reservation Taxable.**—Cattle owned by individuals or corporations, and pastured upon an Indian reservation, under a contract with the Indians, sanctioned by the United States, are taxable by the State, although its Constitution contains a disclaimer of all right of any kind in the land of any Indian tribe, until the Indian right is extinguished.[3]

The same principle was applied by the Supreme Court in the case of non-resident owners of cattle grazing in parts of the Osage Indian Reservation in Oklahoma, which were assessed for taxation by that Territory. It was claimed that this tax was invalid on the ground that the Indians were directly and vitally interested in the property. But the court held[4] that this was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians, and that it was immaterial that the cattle were not in any organized county. The tax was levied only upon the personal property, and this was a matter of detail within the legislative discretion.

Where a railroad, chartered under the laws of a Territory, receives a grant from Congress of a right of way over the Indian

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[1] U. S. v. Pearson, Dist. Ct. S. Dak., 231 Fed. 270 (1916). The court in this case followed the decision of the Circuit Court of Appeals above cited. As to termination of such trust see U. S. v. Thurston County, 140 Fed. 456. See also U. S. v. Rickert, 188 U. S. 432, 47 L. Ed. 532 (1902).

[2] See U. S. v. Board of Commissioners of Osage County, Okla., 193 Fed. 485, Cir. Ct. W. D. of Okla. (1911).

[3] Truscott v. Hurlbut Land & Cattle Co., 19 C. C. A. 374, 73 Fed. 60 (1896), Ninth Circuit.

[4] Thomas v. Gay, 169 U. S. 264, 42 L. Ed. 1211 (1898). See also Wagoner v. Evans, 170 U. S. 588, 42 L. Ed. 1154 (1898), reversing in part 5 Oak 31.

Reservation within the Territory, that part of it within the Reservation is subject to taxation by the territorial government.[1]

The fact that an Indian post trader is licensed by the government to trade with the Indians does not exempt his stock in trade from State taxation, such trader being a mere licensee, and not an agent of the government.[2]

The legislation of the Chickasaw nation, imposing an annual privilege or permit tax on live stock owned or held by non-citizens, that is, persons not citizens or members of the tribe, within the limits of the Chickasaw nation, which had received the approval of the governor of the nation and the sanction of the President of the United States, was not repugnant to the Federal Constitution.[3]

§ 29. **Indian Tax Exemptions and Alienations.**—In the legislation for the members of the Choctaw and Chickasaw tribes wherein each one held a patent to 320 acres of allotted land issued under the terms of the Curtis Act, containing a provision that the land should be non-taxable for a limited time, the Court held that this exemption was not a mere personal privilege ending with alienation but it was attached to the land for the limited period prescribed by the act. The Court said if there was any doubt it should be resolved in favor of the patentees. The Court said that such exemptions in the government's dealings with the Indians were not subject to the same rule of construction as applied to other exemptions from taxation. Doubtful expressions were to be resolved in favor of a weak and defenseless people who are wards of the nation and dependent wholly upon its protection and good faith.[4]

It was therefore held in this case, as in also that of the Creek homestead allottees, that they acquired a vested right to exemp-

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[1] Maricopa & Phoenix R. R. Co. v. Arizona, 156 U. S. 347, 39 L. Ed. 447 (1895).

[2] Cosier v. McMillan, 22 Mont. 484.

[3] Morris v. Hitchcock, 194 U. S. 384, 48 L. Ed. 103 (1903); affirming 21 App. D. C. 565.

[4] Choate v. Trapp, 224 U. S. 664, 56 L. Ed. 941 (1912), reversing 28 Okla. 517.

tions from State taxation protected by the Federal Constitution against abrogation by Congress during that period.[1]

§ 30. **State Taxation of Railroads Incorporated By the United States.**—The Union Pacific Railroad Company was organized under Act of Congress, and there was no provision therein respecting taxation by the States through which the road should run. It was held in Thomson v. Pacific Railroad[2] that the principle decided in McCulloch v. Maryland, did not warrant the exemption of the property of this railroad in the State of Kansas from State taxation, and that there was a clear distinction between the means employed by the government and the property of agents employed by the government, although it was conceded that some of the reasoning in the case of McCulloch v. Maryland seemed to favor the broader doctrine. In this case the railroad company was originally incorporated by the legislature of the Territory of Kansas, and subsequently by the State of Kansas, and had been authorized to connect with lines constructed by the company incorporated under Act of Congress. Thus the corporation in this case was a State corporation entitled to certain benefits and subject to certain duties under the legislation of Congress. The court said by Chief Justice Chase, l. c., p. 590:

"We do not think ourselves warranted, therefore, in extending the exemption established by the case of McCulloch v. Maryland, beyond its terms. We cannot apply it to the case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection."

But a few years later the question was directly presented, as to the taxability under State law of the property of the Union Pacific Railroad Company incorporated under Act of Congress. The property of the company was listed for taxation in Lincoln County, Nebraska, and a bill was filed to enjoin the collection

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[1] English v. Richardson, 224 U. S. 680, 56 L. Ed. 949 (1912), reversing 20 Okla. 408.

[2] 9 Wallace 579, 19 L. Ed. 792 (1870).

of the tax. It was strongly urged that the Thomson case did not control, because that company was incorporated by Kansas, while the company in this case was incorporated by Act of Congress. But the court held[1] that this did not present any reason for the application of a rule different from that which was applied in the former case, saying, at p. 36:

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."[2]

§ 31. **Railroad Franchises Granted By United States Not Taxable.**—But while the property used by private agencies employed by the Federal government is taxable by State authorities unless exempted by Act of Congress, franchises conferred by Congress are not taxable. Thus the assessment by the State of California upon the Pacific railroads incorporated by Act of Congress was held void, because the franchises granted by the United States government were included in the valuation. The court pointed out that in the Thomson case and the Peniston

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1 Railroad Co. v. Peniston, 18 Wallace 5, 21 L. Ed. 785 (1873).

2 Justice Swayne concurred on the ground that Congress had not given the exemption claimed. Three Justices, Bradley, Field and Hunt, dissented; Justice Bradley saying in his dissenting opinion, p. 50:

"If the roadbed may be taxed, it may be seized and sold for nonpayment of taxes—seized and sold in parts and parcels, separated by county or State lines—and thus the whole purpose of Congress in creating the corporation and establishing the line may be subverted and destroyed.

"In my judgment, the tax laid in this case was an unconstitutional interference with the instrumentalities created by the national government in carrying out the objects and powers conferred upon it by the Constitution."

case, the tax was upon the property of the company, and not upon the franchises or operations,[1] and that which the State could tax the "outside visible property of the company" situated within its jurisdiction, it could not tax the franchises which were the grant of the United States.

§ 32. **Definition of United States Franchise.**—The Court, in its opinion in this last cited case, said that Blackstone, under the English law, defined a franchise as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." In this country, a franchise was a right, privilege, or power of public concern, which could not be assumed without legislative authority. In view of this description of a franchise, it follows that such a grant by Congress could not be taxed by a State without the consent of Congress, and that the taxation of a corporate franchise as such, was the exercise of an authority somewhat arbitrary, as it had no limitation except in the discretion of the taxing power. The levying of such a tax by the State on a franchise granted by Congress, was subversive of the power of the government, and repugnant to its paramount authority.

It will be observed that the definition of a franchise in this case was made to show that from its nature, a franchise granted by Congress could not, without its consent, be taxed by a State; while the definition of a State corporate franchise, in Home Insurance Company case, *supra,* Sec. 18, was given to show that it was a property right granted by the State, and, therefore, within the taxing power of the State.

§ 33. **Intangible and Tangible Property of Railroads Incorporated By United States Taxable.**—But it is only the franchises granted by Congress which are not taxable by State authority. The *intangible,* as well as the *tangible property,* of the company is subject to State taxation, and the decision of the Supreme Court of the State that the franchises taxed are franchises granted by the State is conclusive upon the Federal court.[2] The

[1] California v. Pacific R. R. Co., 127 U. S. 3, 32 L. Ed. 150 (1888).

[2] Central Pacific R. R. Co. v. California, 162 U. S. 91, 40 L. Ed. 403 (1896), affirming 105 Cal. 576.

court says in the case last cited, after reviewing the decisions, at p. 125:

"It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a State may tax the property of the agents, subject to the limitations pointed out in Railroad Co. v. Peniston, Van Brocklin v. Tennessee, *supra*.

"Of course, if Congress should think it necessary for the protection of the United States to declare such property exempted, that would present a different question. Congress did not see fit to do so here, and unless we are prepared to overrule a long line of well considered decisions the case comes within the rule therein laid down. Although in Thomson's case it was tangible property that was taxed, that can make no difference in principle, and the reasoning of the opinion applies.

"Under the laws of California plaintiff in error obtained from the State the right and privilege of corporate capacity; to construct, maintain and operate; to charge and collect fares and freights; to exercise the power of eminent domain; to acquire and maintain right of way; to enter upon lands or waters of any person to survey route; to construct road across, along or upon any stream, water course, roadstead, bay, navigable stream, street, avenue, highway or across any railway, canal, ditch or flume; to cross, intersect, join or unite its railroad with any other railroad at any point on its route; to acquire right of way, roadbed and material for construction; to take material from the lands of the State, etc., etc.

"It is not to be denied that such rights and privileges have value and constitute taxable property."

§ 34. **Telegraph Companies Under the Act of July 24, 1866.** —The acceptance by a telegraph company of the provisions of the act of July 24, 1866,[1] giving the right to construct, maintain and operate lines over the military and post roads of the United States does not give it a Federal franchise, or make it an instrumentality of the government, so as to prevent a State or any of its municipalities from imposing a license tax upon the telegraph company's right to do local business within the State.[2]

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[1] R. S. Secs. 5263, 5268; Secs. 10072, 10077, Comp. Stat. 1913.

[2] Williams v. Talladega, 226 U. S. 404, 57 L. Ed. 275 (1913), reversing 164 Ala. 633.

The Act of Congress conveyed no title, and while it made the erection of telegraph lines free to all submitting to its conditions as against any State attempt to exclude them, except in this negative sense the statute was only permissive and not a source of positive rights.[1] It therefore followed that the acceptance of the provisions of this act did not impair the authority of the State to tax its property both tangible and intangible, and it was immaterial that the tax upon such property was termed a franchise tax.[2]

A telegraph company, however, which accepts the provisions of this act, occupies the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business, and an ordinance which taxed without exemption the privilege of carrying on this government agency was held invalid.[3]

As to the method of determining the valuation of interstate telegraph property, see *infra,* Sec. 269. An assessment of the property and franchises of the company specifically including the value of the franchise conferred by the Act of Congress under the Act of 1866 is in so far illegal.[4]

§ 35. **The Taxability of Federal Agencies.**—As the basis of exemption of Federal securities is not the express declaration of the statute, but the relation of such securities to the functions of the government, so it is fundamental that neither the taxing nor the police authority of the State can be used to interfere in any wise with the functions of the Federal government. This was illustrated in the holding that a statute of North Dakota

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[1] Western Union Teleg. Co. v. Richmond, 224 U. S. 160, 56 L. Ed. 710. (1911).

[2] Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 38 L. Ed. 871 (1893); Western Union Telegraph Co. v. Missouri, 190 U. S. 412, 47 L. Ed. 1116 (1902); Western Union Telegraph Co. v. Pennsylvania, 195 U. S. 540, 49 L. Ed. 312 (1904); Western Union Telegraph Co. v. Trapp, 186 Fed. 114, C. C. A. 8th Cir. (1911).

[3] Williams v. Talladega, *supra;* Western Union Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067 (1882).

[4] Western Union Telegraph Co. v. Wright, 185 Fed. 250 (1910); C. C. A. 5, reversing 166 Fed. 954, 158 Fed. 1004.

which required that receipts for the payment of the Federal Internal Revenue tax upon the business of selling intoxicated liquors should be registered and published at the holder's expense was not a valid exercise of the police power of the State, but was invalid as placing a direct burden upon the taxing power of the Federal government.[1]

The franchises granted by the Hawaiian government between July 7, 1898, and September 28, 1899, were not made acts of Congress by adoption so as to be exempt from territorial taxation by the provisions of the organic Act of 1900, affirming such franchises.[2]

A surety company does not, by becoming conformably to the Act of August 13, 1894, a surety on bonds required by the United States become a Federal instrumentality so as to be exempt from a State tax on premiums reserved exacted from foreign corporations on privilege of doing business within the State.[3]

So also the property of a government contractor which on the default of the contractor has been taken for use in completing the contract is not exempt from taxation, in the absence of an act of Congress to that effect, as the government had no ownership therein.[4]

Land conveyed by the United States to a corporation for dry dock purposes with a reserved right in the grantor to a free use of the dry dock, and a provision for forfeiture in the case of the unfitness of the dry dock for use, or the use of the land for other purposes, is not exempt from taxation as an agency of the United States. The tax would be held in such case to create a lien upon the interest of the company alone.[5]

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[1] North Dakota *ex rel* Flaherty v. Hanson, 215 U. S. 515, 54 L. Ed. 307 (1910), reversing 14 N. Dak. 347.

[2] Honolulu Rapid Transit & L. Co. v. Wilder, 211 U. S. 137, 53 L. Ed. 121 (1908); affirming 8 Hawaii 15.

[3] Fidelity & Deposit Co. of Md. v. Commonwealth of Pa., 240 U. S. 319, 60 L. Ed. 664 (1916); affirming 244 Pa. 67.

[4] United States v. Moses, 185 Fed. 90, C. C. A. 8th Cir. (1911).

[5] Baltimore Shipping & Dry Dock Co. v. Baltimore, 195 U. S. 375. 49 L. Ed. 242 (1904); affirming 97 Md. 97.

§ 36. **Letters Patent and Copyrights.**—Letters patent[1] and copyrights[2] granted by the United States are governed by the same principle. Thus a State cannot require a license for the use of patent rights within its jurisdiction, as such requirement is a violation of the rights of the patentee under the Federal law.[3] But in the matter of patents and copyrights a distinction, analogous to that made in the case of railroad franchises and property, is taken between the right of discovery and the right of property in the fruit of the discovery. Thus in the language of the Supreme Court,[4] the use of the tangible property which comes into existence by the application of the discovery protected by the patent, is not beyond the control of State legislation, simply because the patentee obtains a monopoly in his discovery. And in a later case[5] the court said, l. c., p. 347:

"The right conferred by the patent laws of the United States does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the State. It is only the right to the invention or discovery, the incorporeal right, which the State cannot interfere with."

This distinction was applied by the Supreme Court of Pennsylvania,[6] to the case of a lessee of the American Bell Telephone Company, who was held to be taxable by the State on his interest in the telephone instruments, leased under a contract granting the exclusive use for a term of years. The court said, l. c., p. 130:

"The distinction was between the incorporeal rights secured by letters patent and the tangible commodity or finished product, which is its fruit. This finished product or fruit is merchandise, whether it takes the form of a patent reaper, a power printing

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[1] State v. Butler, 3 Lea (Tenn.) 222; People v. Assessors, 156 N. Y. 417, and 42 L. R. A. 290; Commonwealth v. Electric Co., 151 Pa. 265.

[2] People v. Roberts, 159 N. Y. 70, 45 L. R. A. 126; People v. Knight, 73 N. Y. Supp. 745; People v. Harkness, 44 N. Y. Supp. 51.

[3] Commonwealth v. Petty, 96 Ky. 452, 29 L. R. A. 786.

[4] Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115 (1879).

[5] Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565 (1881).

[6] Commonwealth v. Central D. & P. Co., 145 Pa. 121.

press, a fountain pen, a pencil sharpener, or an instrument called a telephone.[1]

§ 37. **Corporate Capital Invested in Patent Rights.**—Where the corporate capital is invested in patent rights, it would follow from the rule applied in the case of government securities, that the validity of the tax depends upon whether it is upon corporate property or the stock as representing that property, and that if it is upon either, the value of the patent rights must be deducted, as in the case of Federal securities; but otherwise if the tax is upon the corporate franchise, or upon the shares of stock to the holders. Thus in a Maryland case, it was held that as the tax was levied upon the owners of the corporate shares, it was immaterial what the assets or other property were, which made up the value of the shares.[2]

§ 38. **State Tax on Bequests to United States.**—A State has the power to levy an inheritance tax upon the right of inheritance which is in effect a limitation upon the power of the testator to bequeath his property to whom he pleases. The tax is not upon the property, but upon its transmission by will or descent. This principle was first decided in an interesting case from New York, where a testator devised all his property to the United States government, and the question was raised whether the State had the power to tax bequests made to the United States. The court held that it had such power and that the tax must be paid by the United States before it could receive the legacy.[3] It was also decided that the Federal government was not organized for a religious, charitable or reformatory purpose within the meaning of the New York statute exempting such corporations from paying the tax, and that the exemption was not intended to apply to a purely political or government corporation like the United States.

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[1] See also Commonwealth v. Brush Electric Light Co., 145 Pa. 147.

[2] Crown Cork & Seal Co. v. Maryland, 87 Md. 687. But see Commonwealth v. Phila. Co., 157 Pa. St. 527.

[3] United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287 (1896), affirming 141 N. Y. 479.

§ 39. **United States Securities Not Exempt From State Inheritance Tax.**—A legacy of United States bonds is not exempt from the inheritance tax laws of New York, although it appears on the face of the bonds that they were exempted from taxation in any form by State authority.[1] It was urged that such a tax impaired the borrowing power of the government. This was too remote in effect to make the statute invalid, and the argument would apply equally to State taxation of corporate franchises, measured by the value of the corporation's property composed in whole or part of United States bonds. After an exhaustive review of the decisions as to the nature of an inheritance tax, the court said, l. c. p. 134:

"We think the conclusion, fairly to be drawn from the State and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed in whole or in part of Federal securities does not invalidate the tax or the law under which it is imposed."

§ 40. **Treaty-Making Power and State Taxation.**—Treaties made under the authority of the United States, as well as the Constitution and laws of the United States, are the supreme law of the land, Article VI., Section 2. But, it would seem, a treaty made by the United States with a foreign country cannot, any more than a statute, control the State in its taxation of the subjects of taxation within its jurisdiction, and that, where the treaty contemplates action by a State upon a subject within its jurisdiction, the State must itself accept the terms of the treaty. This was illustrated in the case of the inheritance tax law of Louisiana, but the point was not definitely decided by the Supreme Court. The laws of Louisiana imposed a tax of ten per cent on the value of all property inherited in that State by any person not domiciled there, and not being a citizen of any State

[1] Plummer v. Coler, 178 U. S. 115, 44 L. Ed. 598 (1900), Justice White dissenting.

or Territory of the United States. The treaty with France, proclaimed August 12, 1853, provided that in all States of the Union, whose laws permitted, so long and to the same extent as said laws should remain in force, Frenchmen should enjoy the right of possessing personal and real property in the same manner and to the same extent as citizens of the United States, and that in no case should they be subjected to taxes on transfers, inheritances or any others, different from those paid by citizens of the United States. A French subject inheriting a Louisiana estate from his sister who died prior to the proclamation of the treaty, contested the payment of this tax. The Supreme Court in affirming the judgment of the Supreme Court of Louisiana,[1] said through Chief Justice Taney, that the law applied to cases where the right to inherit subsequently accrued, but added l. c., p. 7:

"In affirming this judgment, it is proper to say that the obligation of the treaty and its operation in the State, after it was made depend upon the laws of Louisiana. The treaty does not claim for the United States the right of controlling the succession of real or personal property in a State. And its operation is expressly limited 'to the States of the Union whose laws permit it, so long and to the same extent as those laws shall remain in force.' And, as there is no act of the legislature of Louisiana repealing this law and accepting the provisions of the treaty, so as to secure to her citizens similar rights in France, this court might feel some difficulty in saying that it was repealed by this treaty, if the State court had not so expounded its own law, and held that Louisiana was one of the States in which the proposed arrangements of the treaty were to be carried into effect."

As to the treaty-making power with reference to the taxing power of Congress, see *infra,* Sec. 578.

In a later case,[2] the court construed the treaty with Wurtemburg and held that it had no application to the property of a

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[1] Prevost v. Grenaux, 19 How. 1, 15 L. Ed. 572 (1857). The courts of Louisiana seem to have recognized rights of aliens under treaty stipulations with reference to the inheritance tax, see Succession of Rixner, 48 L. Ann. 552, 32 L. R. A. 177 (1896).

[2] Frederickson v. Louisiana, 23 How. 445, 16 L. Ed. 577 (1860).

naturalized citizen of the United States dying in Louisiana. It said, p. 448:

"It has been suggested in the argument of this case, that the government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the States. The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration."

§ 41. **Tax Evasion Through Investments in United States Securities.**—The exemption of United States bonds and notes from taxation (now repealed as to notes) afforded opportunities for tax evasion, which however found no favor with the courts. Thus where a citizen of Kansas withdrew his money from bank on the day before the annual date for listing for taxation, converted this money into United States notes and deposited them as a special deposit, the court[1] affirmed a judgment of the Circuit Court of Kansas dismissing the bill in equity to restrain the collection of the tax. It said that a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation, and that his remedy, if he had any, was in a court of law.

But a party who sued at law to recover the amount of taxes imposed upon him under somewhat similar circumstances met with the same fate.[2] In his case the court held that the statute of Ohio did not tax the citizens for the greenbacks or other government securities which they might have held at any time during the year, but taxed upon the money, credits or other capital which they had or used according to the monthly average of the preceding year, and that this was not in conflict with the laws of the United States exempting United States notes, the court adding, l. c., p. 599:

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[1] Mitchell v. Board of Commissioners, 91 U. S. 206, 23 L. Ed. 237 (1875).

[2] Shotwell v. Moore, 129 U. S. 590, 32 L. Ed. 827 (1889), affirming 45 Ohio St.

"It needs no other evidence that the rule adopted by the State of Ohio is the better one than the case before us, by which a possessor of large means, subject to taxation during every day in the year but one, may escape the payment of any tax upon all his property, if the trick resorted to in the present case be successful."

Justice Bradley, however, dissented, saying that he did not wish to aid the plaintiff, but it was a question of law, and the law of Ohio seemed to him repugnant to the Act of Congress.

§ 42. **Payment of State Taxes in Coin Sustained.**—Congress during the Civil War authorized the issue of the so-called "legal tender" treasury notes and made them legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest on bonds and notes of the United States. The State of Oregon required the payment of the State and school taxes in gold and silver coin. The Supreme Court held [1] that this act was valid, and affirmed the judgment of the Supreme Court of Oregon for the payment in coin of the taxes for the year 1863, coin being then at a premium, although tender of payment had been made in United States notes, which were then depreciated. It said that the State had the power to control the payment of its own taxes, and that there was nothing in the Constitution which contemplated or authorized any abridgment of this power by national legislation. The Act of Congress making the United States notes legal tender for debts had no reference to taxes imposed by State authority.

[1] Lane County v. Oregon, 7 Wall. 75, 19 L. Ed. 101 (1869).

CHAPTER II.

CONTRACTS OF EXEMPTION FROM TAXATION.

§ 43. Legislative grants held to be contracts.
44. Grant of exemption held a contract.
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§ 43. **Legislative Grants Held to Be Contracts.**—The Constitution of the United States provides, Article I., Sec. 10: "No State shall pass any law impairing the obligation of contracts." The application of this provision to legislative grants of exemption from taxation is firmly established by the decisions of the Supreme Court, though from the beginning there has been a series of dissents, and the doctrine of the earlier decisions has been in some respects materially modified in later years.

The foundation of the doctrine was laid in one of the notable

opinions of Chief Justice Marshall, Fletcher v. Peck, in 1810,[1] wherein it was held that this provision of the Constitution extends to contracts to which the State is a party, that is, to legislative grants. The court said that while one legislature is competent to repeal any act of general legislation which a former legislature was competent to pass, yet if an act is done under a law, a succeeding legislature cannot undo it. "It will be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected."

§ 44. **Grant of Exemption Held a Contract.**—Soon after, the same principle was applied by the court[2] to the act of the legislature of New Jersey enacted in 1758, providing that lands purchased from the Delaware Indians, and set apart for their use, in consideration of a release by them of other lands, should not thereafter be subject to any taxation, any law or usage or custom to the contrary notwithstanding, and further restraining the Indians from making any lease or sale. Subsequently, the legislature, having, at the petition of the Indians, authorized a sale by an act making no reference to the exemption from taxation, the land in 1803 was sold. After the sale the legislature, in 1804, passed an act repealing the exemption from taxation. It was held by the court in an opinion by Chief Justice Marshall, reversing the New Jersey court, that this was a valid contract protected by the Constitution, and that the privilege, though for the benefit of the Indians, was annexed by the terms of the act to the land and not to the persons.[3]

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[1] 6 Cranch 87, 3 L. Ed. 87.

[2] New Jersey v. Wilson, 7 Cranch 164, 3 L. Ed. 164 (1810).

[3] Certain of the lands held exempt in this case had been leased out under an act of 1796, which was not brought to the attention of the court in the Wilson case, and subsequently for about sixty years taxes were regularly assessed upon these lands and paid. It was held by the Supreme Court in Given v. Wright, 117 U. S. 648, 29 L. Ed. 1021 (1886), that this probably would not have affected that decision, which had, at all events, been referred to and relied on in so many cases from the date of its rendition that it would cause a shock to our jurisprudence to disturb it, and added at p. 655: "If the question were a new one we might regard the reasoning of the New Jersey judges as entitled to a

§ 45. **Contracts of Exemption Not Implied.**—After the decision in the Dartmouth College case, that the clause of the Constitution under consideration applied to corporate charters, the claim was made that an act of the Rhode Island legislature imposing a tax on every bank in the State except the Bank of the United States, on the capital stock actually paid in, impaired the obligation of the contract created by the charter granted by Rhode Island to Providence Bank. The court declared, by Chief Justice Marshall, that as the charter contained no stipulation promising exemption from taxation, the State had made no express contract, and hence no contractual obligation had been impaired.

It was argued that the power to tax involved the power to destroy all the profits of the franchise, and therefore was inconsistent with the grant. But the court replied that the relinquishment of the power of taxation was never to be presumed, and that the argument logically pursued would apply with equal force to every incorporated company and even to the taxation of land. The principle applied in McCulloch v. Maryland and Osborn v. Bank of the United States had no application. The exemption there was founded expressly on the supremacy of the laws of Congress, and the necessary consequence of that supremacy was to exempt its instrument employed in the execution of its powers from the operation of any interfering power whatever. The vital power of taxation may be abused, but the Constitution of the United States was not intended to furnish the correction of every abuse of power which may be committed by the State governments. The court saying:

"The interest, wisdom and justice of the representative body and its relations with its constituents furnish the only security,

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great deal of weight, especially since the emphatic declarations made by this court in Providence Bank v. Billings, 4 Peters, 514, 7 L. Ed. 939 (1830), and other cases, as to the necessity of having the clearest legislative expression in order to impair the taxing power of the State." But apart from that, the court held that long acquiescence under the imposition of the taxes raised the presumption that the exemption which had once existed had been surrendered.

where there is no express contract against unjust and excessive taxation as well as against unwise legislation generally."[1]

§ 46. **The Validity of Tax Exemption Contracts Established.**—In 1845, in the case of Gordon v. Appeals Tax Court,[2] the principle that contracts to which the State is a party, are protected by the Federal Constitution from impairment of their obligation, was enforced for the first time by the Supreme Court in case of exemption from taxation in a corporate charter. An act of Maryland continuing a bank charter, upon condition that the corporation should pay certain sums for public purposes, and declaring that upon its accepting and complying with the provisions of the act, the faith of the State was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, was held to exempt, not only the franchise, but the stockholders from a tax levied upon them as individuals. It has been ruled in later cases that this decision turned upon the construction of the act of Maryland above mentioned, exempting the bank from taxation on account of a large bonus to the State, and that the stockholders upon a true construction of the act were within the terms of the exemption.[3]

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[1] Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939 (1830), Justice McLean, in delivering the opinion of the court in Piqua Branch v. Knoop, 16 Howard 387 (in 1853), says: "In the argument the case of Providence Bank v. Billings, was referred to. This reference impresses me with the shortness and uncertainty of human life. Of all the judges on this bench when that decision was given I am the only survivor. From several circumstances the principles of that case were strongly impressed upon my memory, and I was surprised when it was cited in support of the doctrines maintained in the case before us. The principle held in that case was, that where there was no exemption from taxation in the charter, the bank might be taxed. This was the unanimous opinion of the judges, but no one of them doubted that the legislature had the power, in the charter or otherwise, from motives of public policy, to exempt the bank from taxation, or by compact to impose a specific tax upon it." See also Memphis Gas Co. v. Shelby Co., 109 U. S., 398, 27 L. Ed. 398 (1883), holding that exemption from license taxation could not be inferred.

[2] 3 Howard, 133, 11 L. Ed. 529 (1845).

[3] This case has been criticised and distinguished on the proposition that exemption may be implied from the payment of a consideration

§ 47. **Application to Consolidated Corporation.**—Later decisions of the court applied the principle to the case of a consolidated corporation made up of constituent roads, one of which had a chartered exemption from taxation. Thus, the exemption must be strictly construed, as the taxing power is never presumed to have been relinquished unless the intention to relinquish is declared in clear and unambiguous terms, and such of the property of the consolidated company as was subject to taxation before, continued to be so subject, notwithstanding the claim to exemption of part of it, which could only apply to that part.[1]

§ 48. **Ohio Bank Tax Cases.**—In a series of decisions the court enforced the limitation, contained in its charter, upon the liability to taxation of the State Bank of Ohio.[2] The charter provision was declared in these cases to be in lieu of all taxes to which the company or stockholders would be otherwise subject. In Jefferson Branch Bank v. Skelly,[3] decided in 1861, the court reaffirmed this ruling, refusing to conform to the decision of the Supreme Court of Ohio, which, it seems, had changed its ruling upon the subject. But it said that its "appellate power would be of no use to a litigant if the court could not decide, independently of all adjudication of the Supreme Court of the State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitu-

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for the franchise. See New Orleans, Etc., Co. v. New Orleans, 143 U. S. 192 and 195, 36 L. Ed. 121 (1892); also upon the extension of an exemption of corporate property and franchises to corporate stockholders, see Shelby County v. Union Bank, 161 U. S. 149 and 157, 40 L. Ed. 651 (1896); see also dissenting opinion of Justice Catron in Piqua Branch v. Knoop, 16 Howard 401, 14 L. Ed. 977 (1853), *supra*, Sec. 45.

[1] Philadelphia & Wilmington R. Co. v. Maryland, 10 How. 376, 13 L. Ed. 461 (1850).

[2] Piqua Branch v. Knoop, *supra*, three judges, Catron, Daniel and Campbell dissenting. Ohio Life Ins. & Trust Co. v. Debolt, 16 How. 416, 14 L. Ed. 416 (1852); Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401 (1856).

[3] 1 Black 436, 17 L. Ed. 173 (1862), reversing 9 Ohio 606.

tion of the United States, and its obligation should be enforced, notwithstanding a contrary conclusion of the Supreme Court of the State." And the court added:

"We are aware that the very stringent rule of construction of this court in respect to taxation by a State has not been satisfactory to all persons. But it has been adhered to by this court in every attempt hitherto made to relax it; and we presume it will be, until the historical recollections, which induced the framers of the Constitution of the United States to inhibit the States from passing any law impairing the obligation of contracts, have been forgotten. This court's view of that clause of the Constitution, in its application to the States, is now, and ever has been, that the State legislatures, unless prohibited in terms by State constitutions, may contract by legislation to release the exercise of taxing a particular thing, corporation, or person, as that may appear in its act, and that the contrary has not been open to inquiry or argument in the Supreme Court of the United States."

§ 49. **Missouri Exemptions Enforced Against Constitutional Repeal.**—The general subject of the inviolability of charter exemptions, particularly with reference to charitable and educational corporations, is very thoroughly discussed in the Home of the Friendless[1] and the Washington University[2] cases from Missouri, decided in 1869. Both of these corporations had been chartered by the State of Missouri, and their charters exempted their property from taxation. At that time there was no constitutional prohibition of such exemptions. Subsequently, however, the Missouri constitution of 1865 prohibited all exemptions from taxation. The Supreme Court of Missouri[3] held that the property was taxable, and said in the University case:

"When the charter of the university was granted, the legislature might have considered it reasonable to foster and encourage it in its infancy and confer upon it privileges and immunities while struggling into existence. But no provision is made in express terms, or by reasonable intendment, that those immunities should be perpetual and have the effect of withdrawing millions of subsequently acquired property from taxation. In 1853 taxes

1 8 Wallace 430, 19 L. Ed. 495 (1869), reversing 42 Mo. 361.

2 8 Wallace 439, 19 L. Ed. 498 (1869), reversing 42 Mo. 308.

3 Washington University v. Rowse, 42 Mo. 308, l. c. p. 326.

were light and the State debt was small, and exemptions could be made without great detriment. After that period the State embarked into a false and ruinous system of loaning its credit to corporations, by which it incurred an immense debt; then followed the Civil War, which increased its already burdensome obligations, and taxation became exceedingly onerous.

"In this condition of things it was deemed the part of wisdom to make all property within the jurisdiction of the State, receiving the benefit of her laws and protection, contribute its proper proportion and share the common burdens. This was entirely a matter resting in the sound discretion of the legislative branch of the government, and we have been unable to find any objection to their exercise of the power."

§ 50. **Opinion in the Missouri Cases—Consideration Required.**—These cases were both reversed by the Supreme Court which said that the question was no longer open for argument, for it was settled by repeated adjudications of the court, that a State may by contract based on a consideration exempt the property of an individual or corporation from taxation either for a specified period or permanently, and that it was not necessary that the consideration should be named in the Act, but it was sufficient that the legislature deemed the object of the grant to be beneficial to the community.

To the argument made in the University case that the exemption involved a dangerous power which might be abused, the court replied that as long as the corporation used its property to support the educational establishment for which it was organized it did not forfeit its right of exemption under the contract.[1]

Nearly thirty years later, in denying a claim of exemption, the court declared that the same necessity for a consideration exists for the purpose of a contract exempting property from taxation than there would be if it were a contract between private parties,

[1] A dissenting opinion was filed in both cases by Justice Miller, Chief Justice Chase and Field concurring, which conceded that the majority opinion was in accord with the prior decisions of the court, but said that the dissents of some of their predecessors showed that the doctrine had never received the full assent of the court and that they contented themselves with reviewing this protest against the doctrine which they thought must finally be abandoned.

and the absence of a consideration may make the act merely a gratuity, which is subject to the will of the legislature, and therefore may be withdrawn at any time. The court in its opinion cited the decision in the Home of the Friendless case, and said that the recitals in the preamble of that case showed that it was granted for a public purpose, and to induce the incorporators to accept the charter and carry out their purpose. [1]

§ 51. **Northwestern University v. People and Other Cases.** —In University v. People of Illinois,[2] the court, in an opinion by Justice Miller, held that the statute of Illinois, as construed by the Supreme Court of the State, limiting the chartered exemptions of the Northwestern University to the lands and other property in the immediate use of the institution, was erroneous and that the exemption extended to the property, the annual profits whereof were devoted to the purposes of the institution.

In the case of St. Ann's Asylum in New Orleans, which was exempted from taxation as to all of its property, real and personal, it was held that the exemption extended to the devise of certain property, *i. e.*, a cotton press, the revenues whereof were applied to asylum purposes.[3] But in the case of Christ Church Hospital of Philadelphia,[4] it was held that there was no contract for perpetual exemption, but only a gratuitous concession on account of temporary conditions.

§ 52. **Bank Notes and Coupons Made Receivable for Taxes.** —The charters of banks of some of the Southern States provided that their bills and notes should be receivable in payments of all taxes and other moneys due the States. Such charters were adjudged contracts on the part of the States with all subsequent holders of the notes, as if attached to the notes when is-

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[1] See Grand Lodge v. New Orleans, 166 U. S. 143, 41 L. Ed. 951 (1897).

[2] 99 U. S. 309, 25 L. Ed. 387 (1878), reversing 80 Ill. 333.

[3] Asylum v. New Orleans, 105 U. S. 362, 26 L. Ed. 1128 (1882), reversing 31 La. Ann. 292.

[4] Rector, Etc., v. County of Philadelphia, 24 Howard 300, 16 L. Ed. 602 (1861).

sued, and the contract right to tender the notes in payment of taxes continued after the repeal of that section of the charter.[1] The court said:

"The guaranty is in no sense a personal one. It attaches to the note—is a part of it as much so as if written on the back of it, and goes with the note everywhere and invites every one who has taxes to pay to take it."

§ 53. **Tennessee Constitutional Amendment Held Void.**—In Tennessee, a constitutional amendment adopted in 1865 declared the issues of the Bank of Tennessee during the Civil War to be void, and forbade their receipt for taxes. But it was held[2] that this amendment was void, for there was only one State of Tennessee and its attempted secession was ineffective. The political body continued as a State in the Union and never escaped the obligations of the Constitution. The court in its opinion cites the periods of the Commonwealth in England and of the Revolution in France as showing that the acts of the government were upheld. It could not presume that the notes were issued to support the rebellion because issued contemporaneously with it, and the tender of notes in payment of taxes was held good.[3]

§ 54. **Mississippi Notes in Aid of Confederacy Held Void.**—But where notes were issued by the legislature of Mississippi in aid of the Confederacy, in 1861, and made receivable in payment of taxes, they were void and not receivable in payment of taxes, which the reorganized State government directed should be paid in the currency of the United States.[4]

The court said that the judicial and legislative acts hostile in their purpose and mode of enforcement to the authority of the national government, or which impair the rights of citizens un-

[1] Woodruff v. Trapnall (Arkansas), 10 How. 190, 13 L. Ed. 383 (1850), reversing 8 Ark. 236; Furman v. Nichol, 8 Wall. 44, 19 L. Ed. 370 (1869), reversing 3 Caldwell, 432; State v. Stoll (S. C.), 17 Wall. 425, 21 L. Ed. 650 (1873).

[2] Keith v. Clark, 97 U. S. 454, 24 L. Ed. 1071 (1878).

[3] Chief Justice Waite and Justices Bradley and Harlan dissenting.

[4] Taylor v. Thomas, 22 Wallace 479, 22 L. Ed. 789 (1875), affirming 42 Miss. 651.

der the constitution are invalid and void, and therefore no valid claim for the receipt of such obligations for payment of taxes could be maintained.

§ 55. **Change in Remedy Not Impairment of Contract.**—A State having contracted for the receipt of its bank notes in payment of taxes does not impair the obligation of a contract by enlarging, limiting or altering the modes of procedure for enforcing it, provided the remedy be not withheld or embarrassed with restrictions which seriously impair the value of the right. Thus a taxpayer in Tennessee, who was limited to an action at law against the tax collector to recover the amount of taxes paid in money under protest, was held to have an ample remedy.[1]

§ 56. **The Virginia Coupon Cases.**—The question of the enforcement of a State contract and the receipt of State obligations in payment of taxes, particularly with reference to the adequate remedies provided for the enforcement of such contract, was thoroughly considered in every possible phase by the Supreme Court in a series of cases known as the Virginia Coupon Cases, involving litigation, which, in different forms, was before the court during a period of twenty years.

The State of Virginia in 1871, in adjusting its debt with its creditors on account of the separation of West Virginia during the Civil War, provided for funding two-thirds of its outstanding debt and accrued interest in bonds and coupons, the remaining one-third to be represented by certificates with a view to settlement with West Virginia. To facilitate the acceptance of this adjustment, it was provided that the coupons should be receivable at and after maturity for all taxes, debts, dues and demands due the State, and that this should be expressed on their face. The validity of this contract was at first sustained by the Court of Appeals of Virginia, which held invalid an act repealing the provision for the receipt of coupons for taxes. Thereafter, however, an act was passed providing that from the coupons when

[1] Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610 (1877), see *infra*, change in remedy, Sec. 81; South Carolina v. Gailard, 101 U. S. 433, 25 L. Ed. 937 (1880).

received for taxes there should be deducted a State tax equal to fifty cents on the one hundred dollars of the market value of the bonds, this act applying in terms to all bonds of the State, whether held by her own citizens or by non-residents and citizens of other States and countries. The Supreme Court held[1] that the receivability of the coupons for taxes was clearly a contract obligation inuring to the benefit of all the holders of the bonds and coupons; that the coupons were distinct and independent contracts, and that the taxing act could not be applied to coupons separated from the bonds and held by different owners without impairing the contract with the bondholder and the bearers of the coupons, as contained in the funding act.

§ 57. **Virginia Coupon Cases Under Act of 1882.**—In 1882, the State enacted a law providing that when a *mandamus* was sued out against the collector of taxes to compel the receipt of coupons in payment, the taxpayer should be required to pay the taxes in money and file his coupons for the trial of the issue as to their genuineness. If the issue was found in their favor, the money paid was to be refunded out of the State treasury in preference to all other claims. The court, reaffirming its opinion as to the contract right to pay taxes in coupons, held that the remedy provided by this act was adequate and efficacious, and substantially equivalent to that which existed at the date when the coupons were issued.[2] It said, however, that the question whether the tax collector was not bound in law to receive the coupons when tendered, and whether, if he refused them and proceeded with the collection of the tax, he could not be made personally responsible in damages was not before them.

§ 58. **The Supreme Court on the Eleventh Amendment of the United States Constitution.**—This question did come later before the Supreme Court in a series of cases, reported as the Virginia Coupon Cases.[3] The court reaffirmed its previous opinion, and held that the taxpayer was not compelled to seek the

[1] Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271 (1881).
[2] Antoni v. Greenhow, 107 U. S. 769, 27 L. Ed. 468 (1883).
[3] 114 U. S. 269, 29 L. Ed. 185 (1884).

remedy provided by the act of 1882. He could tender his coupons and such tender would be equivalent to payments, so far as concerned the legality of all subsequent steps by the collector to enforce payment by distraint of his property. The coupons, made receivable for taxes, were not bills of credit within the prohibition of the Constitution, nor was the right of the taxpayer to sue the collecting officer for the recovery of property seized for taxes, after he had made a lawful tender, a suit against the State within the meaning of the Eleventh Amendment of the Constitution of the United States. On this point (four judges dissenting) the court said that there was a distinction between the government of a State and the State itself; that, in contemplation of law, the State had not passed the acts violative of the Constitution of the United States, as they were void, and therefore the officer had no official sanction for his conduct and was guilty of a personal violation of the plaintiff's rights. It also sustained the remedy by injunction against the collection of the tax, in cases where there was no adequate remedy at law, but held that a coupon holder, who had not alleged that he was a taxpayer, was not entitled to any relief. No direct action moreover for the denial of rights secured by the contract would lie on the 16th clause of Section 629 of the Revised Statutes of the United States, but the remedy must be a judicial determination between individuals as to the validity of the law, under cover of which the attempt to collect the tax had been made, and the consequent wrongful disturbance of property rights occasioned.

One having tendered coupons in payment of a license required for the practice of a profession could go on practicing his profession, and any law of the State subjecting him to criminal proceedings therefor was invalid. He was not obliged to sue out a *mandamus* to compel the acceptance of the coupons.[1]

§ 59. **The Later Virginia Coupon Cases.**—Another series of coupon cases came up for decision in 1889,[2] and the court ad-

[1] Royall v. Virginia, 116 U. S. 572, 29 L. Ed. 735 (1886), and Sands v. Edmunds, 116 U. S. 585, 29 L. Ed. 739 (1886). See also Willis v. Miller, 29 Fed. 238.

[2] 135 U. S. 662, 34 L. Ed. 304 (1890).

judged void sundry acts of the Virginia legislature opposing impediments and obstructions to the use of coupons, on the ground that these materially impaired the obligation of the contract. Thus the provision which imposed upon the taxpayer the duty of presenting the bond, from which the coupons were cut, at the time of tendering them in payment, was an unreasonable condition. Another provision also was invalid which prohibited expert testimony to establish the genuineness of the coupons. A special license fee of one thousand dollars required for the right to offer tax receivable coupons was adjudged a material interference with their negotiability. The court conceded that the rules affecting the remedy were subject at all times to modification and control by the legislature, even as to existing causes of action, but declared that no legislature had the power to establish rules which, under the pretense of regulating evidence, went so far, as to altogether preclude the party "from exhibiting his rights." It was ruled also that the coupons were lawfully tendered in payment of costs of suits, as well as in payment of taxes, and that the time-limit of one year for tendering coupons was, under the circumstances, unreasonable.

On the other hand, the requirement that the taxes for licenses to sell liquors and school taxes should be paid in lawful money, and not in coupons, did not impair the obligation of the contract. As to the liquor license this decision was put on the ground that there was involved the principle of regulation as well as taxation; and the act of 1871, as applied to the fund for maintaining schools, was contrary to the Virginia constitution of 1869.

The court remarks, concluding the opinions in this series of cases, at p. 721:

"It is certainly to be wished that some arrangement may be adopted which will be satisfactory to all parties concerned and relieve the courts as well as the Commonwealth of Virginia, whose name and history recall so many interesting associations, from all further exhibitions of a controversy that has become a vexation and a regret."

§ 60. **The Supreme Court on Virginia Court Overruling Previous Opinion.**—But this wish was not gratified, and the next step was a decision by the Court of Appeals of Virginia re-

versing its previous opinions, and dismissing the petition of the plaintiff, who tendered coupons in payment of his taxes, on the ground that the coupon provision of the act of 1871 was void.[1]

This case was brought by writ of error to the Supreme Court, where the judgment was reversed,[2] the court saying, in its opinion by Justice Brewer, l. c., p. 106:

"Perhaps no litigation has been more severely contested or has presented more intricate and troublesome questions than that which has arisen under the coupon legislation of Virginia."

The previous decision was reaffirmed. Under the circumstances, said the court, it seemed to them that it would be a clear evasion of the duty cast upon them by the Constitution of the United States to treat all this litigation and these prior decisions as mere nullity and consider the question as a matter *de novo*. It seemed that the act of 1882 for testing the genuineness of the coupons which had been adjudged an adequate and efficacious remedy in Antoni v. Greenhow had been repealed, and it had not been determined by the Court of Appeals of Virginia whether the remedy of *mandamus* to enforce the receipt of coupons for taxes existed. The court said that if it should be finally held by that court that the remedy of *mandamus* did not exist, then it would be a question for further consideration whether the act repealing the act of 1882 could be sustained.

§ 61. **The Supreme Court Determines for Itself Whether State Legislation Constitutes a Contract.**—It has been the uniform ruling of the Supreme Court that it determines for itself whether the State legislation in question constitutes a contract, and it is not bound by the decision of the State court holding that a particular charter or charter provision does not constitute a contract. This is an exception to the general rule that the Federal courts accept the construction placed by the courts of a State upon its statutes and constitution. Thus the court said, in McGahey v. Virginia,[3] l. c., p. 667:

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[1] McCullough v. Virginia, 90 Va. 597.

[2] McCullough v. Virginia, 172 U. S. 102, 43 L. Ed. 382 (1898), reversing 90 Va. 597.

[3] 135 U. S. 662, 34 L. Ed. 304 (1890).

"In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of State courts, to inquire, and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the State courts in relation thereto."

Thus if a statute of a State creates a contract, and it is alleged that a subsequent statute impairs the obligation of that contract, and the highest court in the State construes the first statute in such a manner that the second statute does not impair it, a judgment of the State court sustaining the validity of the second statute on account of its construction of the first statute will be subject to review on writ of error in the United States Supreme Court.[1]

§ 62. **Illustrations of the Independent Judgment As to Contract.**—In the case of Mobile & Ohio Railroad Co. v. Tennessee,[2] the State Supreme Court held that the charter exemption from taxation relied on as a contract was in violation of the State constitution. Reversing this decision, the court held, p. 492:

"The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provisions of the State law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation."

The constitution of Missouri of 1865 provided for a tax of ten per cent upon the gross earnings of certain railroad corporations.

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[1] Bridge Proprietors v. Hoboken Co., 1 Wallace 116, 17 L. Ed. 571 (1864).

[2] 153 U. S. 486, 38 L. Ed. 793 (1894).

As to one company it was held that this tax was an impairment of the obligation of a contract,[1] but in the case of another company the tax was sustained because the court found that the contract of exemption had expired by its own limitation.[2]

§ 63. **Contract Must Be Properly Brought Before the Court.** —The Supreme Court will, however, decide this question of the existence and impairment of a contract, only when the judgment of the State court is brought before it for review. If the decision of the State Supreme Court is in favor of the right or immunity claimed under the United States Constitution, it is final. The same question, however, may be brought before the Supreme Court from one of the United States Circuit Courts in the exercise of its appellate jurisdiction. In such case the court exercises its independent judgment, and may determine that there was no contract of exemption from taxation, notwithstanding a prior judgment of the State court to the contrary. Thus in a case from Tennessee on appeal from the United States Circuit Court,[3] the prior judgment of the State Supreme Court, sustaining the claim of exemption was urged, but the court said, l. c., p. 151:

"In such a case as this where we are to construe the meaning of the clause of the statute as to what contract is contained therein, and whether the State has passed any law impairing its obligation, we are not bound by the previous decisions of the State courts, except when they have been so long and so firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves independently of the decisions of the State courts, whether there is a contract and whether its obligations are impaired."

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[1] Pacific Railroad Co. v. Maguire, 20 Wallace 36, 22 L. Ed. 282 (1874), reversing 51 Mo. 142.

[2] North Missouri R. R. Co. v. Maguire, 20 Wallace 46, 22 L. Ed. 287 (1874), affirming 49 Mo. 490.

[3] Shelby County v. Union, Etc., Bank, 161 U. S. 149, 40 L. Ed. 650 (1896). See also Bank of Commerce v. Tennessee, 161 U. S. 134, 144, 40 L. Ed. 645 (1896), modifying 95 Tenn. 221; also L. & N. R. R. Co. v. Palmes, 109 U. S. 245, 27 L. Ed. 922, affirming 19 Fla. 231.

§ 64. **When State Court Not Followed.**—In a Kentucky case, however, the State court overruled its decision that the act constituted a contract in the case of another party, so that the question came before the Supreme Court.[1] It was urged upon that tribunal that it should follow the first decision of the State court construing the State statute, but it said, pp. 647-8:

"Undoubtedly in the Bank Tax cases, 97 Kentucky, 597, the Court of Appeals of Kentucky decided that the Hewitt law created an irrevocable contract, and that the general assembly of that State could not repeal, alter or amend it without impairing the obligation of the contract, despite the existence of the act of 1856, and despite the circumstances that that act was in express terms incorporated in and made part of the Hewitt law. But the reasoning by which the court reached this conclusion is directly in conflict with the settled line of decisions of this court just referred to, and the case has been specifically overruled by the opinion announced by the Kentucky Court of Appeals in the case now under review. . . . In determining whether, in any given case, a contract exists, protected from impairment by the Constitution of the United States, this court forms an independent judgment. As we conclude that the decision in the Bank Tax cases above cited, upon the question of contract, was not only in conflict with the settled adjudications of this court, but also inconsistent with sound principle, we will not adopt its conclusions."

As the court decides for itself whether a legislative act or charter constitutes a contract and will not be concluded by the decision of the State court, *a fortiori* it will not follow the State court when the latter reverses its previous judgment that the act constituted a contract.[2]

§ 65. **When Concluded By Decision of State Court.**—The Supreme Court, however, adopts the ruling of the State court on points relating to the construction of the State constitution and statutes, other than as to the existence of a contract and the impairment of its obligation. Thus on the question whether a com-

[1] Citizens' Savings Bank v. Owensboro, 173 U. S. 636, 43 L. Ed. 840 (1899), affirming 102 Ky. 174. See also Stone v. Bank of Commerce, 174 U. S. 412, 43 L. Ed. 1028 (1899), reversing 288 Fed. 398.

[2] Jefferson Branch Bank v. Skelly, *supra*.

pany was doing business in the State within the meaning of its statute, the court is concluded by the judgment of the State court. Thus in Erie Railroad Co. v. Pennsylvania,[1] it is said:

"The Supreme Court of that State has held that this 'company was doing business in the State in the sense of that act.' This construction of a State statute by the Supreme Court of the State, involving no question under the laws or Constitution of the United States, is conclusive upon us. We accept the construction of State statutes by the State courts, although we may doubt the correctness of such construction. We accept and adopt it, although we may have already accepted and adopted a different construction of a similar statute of another State, in deference to the Supreme Court of that State."

Thus on the question whether the act done by or under the authority of the State impairs the obligation of a contract, the effect of the act must be determined in the light of the construction given by the State court. If that act as construed and enforced in the State court impairs contract rights, then the Federal court has jurisdiction, to determine, not the correctness of the construction, but whether the effect of the act as construed is to impair the contract right.

§ 66. **Deference to Opinion of State Court.**—In a later case[2] the court said that although it is its duty to exercise an independent judgment as to the nature and extent of a contract, when its jurisdiction is invoked, because of the asserted impairment of contract rights from the effect given to subsequent legislation, nevertheless, when the contract alleged to have been impaired arises from a State statute, the Federal court, for the sake of harmony and to avoid confusion, will lean towards an agreement with the State court, if the question seems balanced with doubt. The constitutional question was held to be sufficiently raised by a public board, which the State court had held to have enough fiduciary capacity for that purpose, since this power of the State board was a matter of local law, on which the decision of the State court would be accepted.

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[1] 21 Wallace 492, 497, 22 L. Ed. 595 (1875).

[2] Board of Liquidation v. Louisiana, 179 U. S. 622; 45 L. Ed. 347 (1901).

This deference to the ruling of the Supreme Court of the State was forcibly illustrated by the decision of the Supreme Court holding that a charter exemption of the Chicago Theological Seminary from taxation of "all its property of whatever kind and description," did not include property owned by it as an investment, the income thereof being used for the purposes of the school, was not so obviously erroneous as to require reversal, although the charter provided that "the act should be construed liberally in all the courts for the purposes therein expressed." [1] The court in its opinion distinguished this case from that of the Northwestern University v. Illinois (*supra,* Sec. 51), saying that in that case there was provision specifically exempting "all the property owned by such corporation," while in the Chicago Theological Seminary case the provision used the term "belonging or appertaining to said Seminary."

This deference to the opinion of the State court was also illustrated in the case where an act supplementary of the charter of a college had granted the same exemption from taxation which had been granted to another educational institution, when a State statute was in force making all corporate charters subject to amendment or repeal. The court said that, bearing in mind its own right of independent judgment, it was unable to say that the conclusion reached by the State Supreme Court, holding that there was no irrepealable contract, was not well founded in law and in fact.[2]

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[1] Board of Directors of Chicago Theol. Seminary v. Raymond, 188 U. S. 662, 47 L. Ed. 641 (1903), affirming 189 Ill. 439, Judges White, Brown and Holmes dissenting.

In Treat v. Grand Canon R. R. Co., 222 U. S. 448, 56 L. Ed. 265, 1912, affirming 12 Ariz. 117, the Court affirmed the decision of the Supreme Court of the Territory of Arizona in sustaining a limited exemption of the railroad property bought at foreclosure, saying it was not so clearly erroneous as to require reversal by the Supreme Court. See also New York *ex rel* Interborough Rapid Transit Co. v. Sohmer, 237 U. S. 226, 59 L. Ed. 951, affirming 207 N. Y. 270, holding that a corporation formed to operate the subway was not exempted from a tax measured by capital stock and gross earnings imposed under the New York tax law.

[2] See Seton Hall College v. Village of South Orange, 242 U. S. 54, 61 L. Ed. —, affirming 86 N. J. L. 365 (1916).

§ 67. **Limitation of Independent Judgment.**—The "independent judgment" of the Supreme Court was materially limited under the decision in a case where the charter of a Mississippi railroad granted in 1882 contained an exemption from taxation for twenty years.[1] The State constitution then in force had been construed by the State Supreme Court as authorizing exemptions from taxation, but also making them *repealable.* It was held that this ruling of the Mississippi court that the constitution only authorized repealable exemptions involved a local and not a Federal question, and the Supreme Court therefore could not review the action of the State court in holding the exemption to have been repealed by a subsequent statute; and, further, that this ruling applied both to privilege taxes and property taxes, since both were repealable exemptions.

§ 68. **Contract Only Impaired By Law.**—Limits are also set to the independent judgment of the Supreme Court in deciding a case of alleged impairment of contract, by the jurisdiction of the State court to determine the construction of the subsequent act by which the contract is claimed to have been impaired. A contract can only be impaired under this provision of the Constitution by a *law;* that is, a law subsequently enacted. In the language of the Supreme Court:

"The State court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void, which in our opinion is valid; it may adjudge a contract to be valid, which in our opinion is void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither of these cases would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by State legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment in terms or by its necessary operation gives effect to some provision of the State constitution, or some legislative enactment of the State,

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[1] Gulf & Ship Island R. R. Co. v. Hewes, 183 U. S. 66; 46 L. Ed. 86 (1901).

which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."[1]

§ 69. **Impaired By Municipal Ordinance Having Force of Law.**—But the term "law" includes not only a provision of the State constitution or State statute, but also a municipal ordinance having the force of law. Thus a tax levied by a municipality under its chartered power, is a law in this sense.[2] But whether the ordinance of a municipality has the force of law so as to constitute an impairment of the contract, is a question involving the construction of local law, whereon the Supreme Court will follow the ruling of the State court.[3]

§ 70. **The Supreme Court Determines What Constitutes Impairment of a Contract.**—The Supreme Court determines for itself, on writ of error to the State court, whether a contract right has been impaired by the enforcement of a tax. A contract may be impaired by a wrongful judicial construction of the contract, as well as by an unconstitutional statute attempting a direct repeal. In the exercise of its appellate jurisdiction over State courts, therefore, the Supreme Court is required to determine by its independent judgment: (1) was there a contract; (2) if so, what obligation arose from it; (3) has that obligation been impaired by subsequent legislation?

Thus, whether or not municipal taxation under a subsequent statute is a public tax within the meaning of the covenant by the lessee from the municipality to pay the public taxes which will become due upon the land, is a question which the Federal Supreme Court will determine for itself on writ of error to the State court in a case involving the impairment of contract obligation by the enforcement of the tax.[4]

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[1] Lehigh Water Co. v. Easton, 121 U. S. 388, 392, 30 L. Ed. 1059 (1887), affirming 102 Pa. 515.

[2] Murray v. Charleston, 96 U. S. 432, 440, 24 L. Ed. 764 (1878).

[3] New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607 (1888), dismissing writ of error in 35 La. Ann. 1111.

[4] J. W. Perry Co. v. Norfolk, 220 U. S. 473, 55 L. Ed. 548 (1911), affirming 108 Va. 28.

While the contract clause in the Constitution is not addressed to such impairment of contract obligations as may arise by mere judicial decisions of the State courts without action by the legislative authority of the State,[1] it is also true that the jurisdiction of the court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the State court; in other words, impairment of the contract right may result from such construction by the State court of the State legislation.[2]

§ 71. **Adjudication of Contract Impairment.**—The adjudication of a State court that a bank has a contract of exemption from taxation on its capital stock is not *res adjudicata* in the Federal Court as to taxes for years other than the one directly involved in the judgment where by the statute law of the State the adjudication with respect to taxation for one year could not be completed, and especially in suits involving taxes for other years.[3]

All defenses then existing to a contract of exemption from State taxation asserted in the suits in the Federal court to enjoin the collection of the tax, whether drawn to the attention of the court or waived, are foreclosed by the decree establishing such exemption and the decree in such case enjoining the collection of the tax because of a contract of exemption from taxation is as controlling on future taxation as on the particular tax to which the suit relates.[4]

§ 72. **What Constitutes a Contract of Exemption.**—A legislative grant may constitute a contract, if the contract is clearly expressed in it, and the right of contract may be based, not only upon what is actually contained in the act itself, but also upon

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[1] See Cross Lake Shooting & Fishing Club v. La., 224 U. S. 632, 56 L. Ed. 924.

[2] See Detroit Union Railway v. Michigan, 242 U. S. 238, 61 L. Ed. —, reversing 162 Mich. 460, 173 Mich. 314, not a taxation case, but involving contract right of a street railway company to charge certain rates of fare in annexed territory, which was sustained by the court.

[3] Covington v. National Bank, 198 U. S. 100, 49 L. Ed. 963 (1905).

[4] Gunter v. Atlantic Coast Line, 200 U. S. 273, 50 L. Ed. 477 (1906).

what by reference is made part of it.[1] The exemption, however, must be clearly stated, and cannot be established by implication.[2]

The grant of all the powers, rights and privileges granted by the charter of another corporation carries with it an exemption from taxation included in such charter. The court said, l. c., p. 247:

"A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling upon others."[3]

The charter of the Louisiana Bank provided that the capital of said bank should be exempt from any taxation. This did not include exemption from the imposition of a license tax for the carrying on of the banking business, especially since the bank was incorporated to aid the agricultural interests of the State, and the State assisted the bank by the loan of its credit and retained partial control of the bank's directorate.[4]

§ 73. **Railroad Franchise Is Property.**—The exemption of the *property* of a railroad company and the shares thereof "from any public charge or tax whatsoever," includes the exemption of the franchise from taxation, the court saying, l. c., p. 267:[5]

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[1] Humphrey v. Pegues, 16 Wallace 244, 21 L. Ed. 326 (1873).

[2] Memphis Gas Co. v. Shelby Co., 109 U. S. 398, 27 L. Ed. 976 (1883), and cases cited.

[3] But see later case of Phoenix Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. Ed. 660 (1896), to effect that there must be other language than the word "privilege," or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted. *Infra*, Sec. 94.

[4] Citizens Bank v. Parker, 192 U. S. 73, 48 L. Ed. 346 (1904), reversing 52 La. Ann. 1086.

[5] Wilmington R. R. Co. v. Reid, 13 Wallace 264, 20 L. Ed. 568 (1872), reversing 64 N. C. 226. This case was distinguished in Wilmington Railroad Co. v. Alsbrook, 146 U. S. 301, 36 L. Ed. 972 (1892), affirming 110 N. C. 137, holding that this exemption did not cover a branch line constructed by another company under a different charter.

"Property is a word of large import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business. . . . Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed and depot grounds, but it is equally with them covered by the general term 'the property of the company,' and therefore equally within the protection of the charter."

§ 74. **Conditional Exemptions From Taxation.**—The power to make exemption from taxation includes the power to make it subject to conditions, or to limit to some specific form of taxation. Thus a railroad company may by grant of the legislature be entitled to the taxation of its property, land included, upon the basis of a per cent upon the gross earnings, and this right will be impaired by an act withdrawing the lands from this arrangement and subjecting them to taxation according to their cash value.[1] The exception may be limited to a term of years, or conditioned upon the completion of a railroad wholly or in part.[2]

§ 75. **The Legislative Power to Make An Exemption Contract.**—The determination of the question of a valid contract of exemption may involve the further question whether the legislature had the power under the State constitution or under the organic act of a territory to make such a contract of exemption. It was said by the Supreme Court that the rule of strict construction is just as applicable, when determining whether words of restriction found in the fundamental law are intended to operate as a limitation on the legislative power to grant contract exemp-

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1 Stearns v. Minnesota, 179 U. S. 223, 45 L. Ed. 162 (1900), reversing 72 Minn. 200; Duluth and Iron Range R. R. Co. v. Minnesota, 179 U. S. 302, 45 L. Ed. 302 (1900), reversing 77 Minn. 433.

2 For further illustration of the enforcement of a partial exemption from taxation for a limited term, see Wright v. Georgia R. R. Co., 216 U. S. 420, 54 L. Ed. 544 (1910), affirming 132 Fed. 912.

tions from taxation, as where the question is whether the particular terms of the alleged contract did or did not embrace an exemption from taxation. Thus the organic act of Washington territory providing that the territorial legislature should not grant private charters or special privileges precluded the power to grant a contract exemption from taxation.[1]

Where a State constitution prohibits the exemption of property from taxation, such exemption cannot be secured by giving it the guise of a contract.[2]

A decision of the highest court of a State, refusing to recognize the existence of alleged property rights of a development company in the bed of a river, is not reviewable in the Supreme Court on the theory that contract obligations were impaired by the effect given by the State court to a repealing act, where such decision was based upon the ground that, irrespective of, and without reference to, the subsequent repealing legislation, the original grant was an unconstitutional attempt by the State to bargain away lands under navigable waters to a private corporation; and the writ of error was dismissed, the Supreme Court declining to take jurisdiction.[3]

§ 76. **Specific Exemptions and General Legislation Distinguished.**—The distinction between an exemption from taxation contained in a special charter and general legislation enacted from considerations of the general good, encouraging all persons to engage in a certain enterprise, is obvious. In the latter case the legislature is not making promises but framing a scheme of public revenue and public improvements, and while it may open chances which may involve benefits, no promises are made to any individual. This distinction was illustrated by the ruling of the court that no contract of exemption from taxation was made by the act of Michigan, May, 1893, that the rate of taxation fixed

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[1] Berryman v. Whitman College, 222 U. S. 333, 56 L. Ed. 225 (1912), reversing 156 Fed. 112.

[2] Forshaw v. Layman, 182 Fed. 193, C. C. A. 8th Cir., construing the Constitution of Arkansas.

[3] Long Sault Developing Co. v. Call, 242 U. S. 272, 61 L. Ed. — (1916), dismissing for want of jurisdiction, writ of error, 212 N. Y. 1.

by that act or any other law of the State should not apply to any railroad company thereafter building and operating a line of railroad within the State north of the Forty-fourth parallel of latitude, until the same had been operated for ten years, unless the gross earnings equaled a specific sum per mile.[1]

But where the statute is a special one which provides a certain tax and in consideration thereof a company formally accepts and makes large expenditures to induce which was the motive of the exemption, a repealable contract was held to be created.[2]

This distinction was also emphasized by the court in the Seton Hall College case[3] where the court found that the college had made no new promises and assumed no new burdens and therefore had done nothing in reliance upon the alleged tax exemption, the court saying:

"To all claims of contract exemptions must be applied the well settled rule that, as the power to tax is an exercise of the sovereign authority of the State essential to its existence, the facts of its surrender in favor of a corporation or an individual must be shown in language, which cannot be otherwise reasonably construed, and all doubts which arise as to the intent to make such contract are to be resolved in favor of the State."

§ 77. **Contract Not to Reduce Dividend By Taxation Below Fixed Per Cent Sustained.**—In a Tennessee case the road with its fixtures, including workshops, warehouses and vehicles of transportation was exempted from taxation for a period of years, and it was further provided that no tax should ever be laid on said railroad or its fixtures, which would reduce its dividend to below eight per cent.[4] The court held that this exemption thus limited was valid; that the word "dividend" had reference to dividends on the capital stock of the company held and owned by its shareholders, and that the term profits out of which alone

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[1] Wisco & M. R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 329 (1903).

[2] Powers v. Detroit, Etc., R. Co., 201 U. S. 543, 50 L. Ed. 860, affirming 138 Fed. 264 (1906).

[3] See Sec. 66, *supra*.

[4] Mobile & Ohio R. R. Co. v. Tennessee, 153 U. S. 486, 38 L. Ed. 793 (1894).

dividends can be declared denoted what remained after defraying every expense, including loans falling due as well as the interest on such loans.

It was claimed that the exemption clause had no operation if the company earned no money for a dividend, because in that event the dividends could not be reduced. But the court said that this theory was wholly wanting in plausibility, as, according to it, the company would be taxable when it made no profits, and only get the benefit of the exemption when profits of a certain amount were realized. In answer to the objection that the company could so keep its accounts or water its stock that it would never earn any dividends of eight per cent, the court said, p. 506 (four judges dissenting):

"In dealing with an exemption from taxation, like that under consideration, good faith is required on the part of both parties to the contract. While the State may not impair or restrict its operation, neither may the railroad company enlarge it at will and without limitation. It is not shown that the railroad company has made any improper or fictitious increase, either of its capital stock or of its bonded indebtedness. On the contrary, the proof establishes that the par value of the 53,206 shares of capital stock outstanding was realized therefor, dollar for dollar, and this amount of capital stock, together with the bonded indebtedness of the company, represents the *cost* of constructing and equipping the railroad. The legislature, in granting the exemption in question, doubtless had in contemplation the cost of the enterprise, and may have intended the immunity from taxation to be estimated on that basis, as in the Mississippi charter.

But however this may be, in sustaining the validity of the exemption in the present case, we do not mean to be understood as holding that the railroad company has the right in its discretion, hereafter, to issue additional capital stock, or to increase its bonded indebtedness, even for legitimate purposes, and have the same taken into consideration upon the question of its liability for taxation under the eight per cent dividend clause of the charter."

§ 78. **Tax on Foreign Held Securities.**—In another class of cases, the right of protection against taxation as an impairment of a contract has been sustained as *necessarily implied* in the con-

tract, though not expressly stated. This includes the levy of a tax by a State or municipality upon foreign held securities.

The question was presented in the case of the Foreign Held Bonds, [1] where it was held that the law of Pennsylvania requiring the treasurer of a railroad company incorporated and doing business within the State, to retain five per cent of the interest due on bonds of the road payable out of the State to non-residents of the State and held by them, was a law interfering between the company and the bondholder, and, under the pretense of levying a tax, impairing the obligation of the contract between the parties. The court said that the bonds issued by the railroad company were undoubtedly property, but property in the hands of the holders, not property of the obligors, and that so far as they were held by non-residents of the State they were property beyond the jurisdiction of the State. It said further that the obligation of a contract depends upon its terms and the means which the law in existence at the time it was made, affords for its enforcement. A law, which alters the terms of a contract, by imposing new conditions or dispensing with those expressed, impairs its obligation, for as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract and it prevents their legal enforcement. [2]

§ 79. **Taxation By State or Municipality of Its Own Securities.**—The same principle was applied in the case of an attempted taxation by a municipality of its own securities held by non-residents. [3] Such a tax was levied by the city of Charleston, and it was provided by the ordinance that the treasurer should retain this tax out of the interest payable to the security holders.

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[1] 15 Wallace 300, 21 L. Ed. 179 (1872). This case has been questioned on another point, i. e., as to the situs of a mortgage for taxation, see Savings Society v. Multonomah County, 169 U. S. 421, 42 L. Ed. 803 (1898), affirming 60 Fed. 31. Sec. 458 *infra*.

[2] Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760 (1878). This case was distinguished in People v. Commissioners, 76 N. Y. 77, holding bonds issued by the city of New York in the hands of residents of the State not exempt.

[3] Murray v. Charleston, *supra*.

But, as to a non-resident holder, the tax was void.[1] It was said at p. 445:

"The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

The court in this opinion says that it was referred to decisions in Ohio and California,[2] in which the power of the State to tax its own bonds was sustained. But they were not in point on the question at issue, which was the right of a municipality to tax its own securities held by non-residents, by withholding the amount of the tax from the interest; and even if they were in conflict with the decision of the case at bar, they would not control the judgment of the court, on the meaning and extent of the Federal Constitution. The opinion was confined to holding that no municipality can by its ordinances, under the guise of taxation, relieve itself from performing to the letter all that it expressly promises to its creditors. The court said that it did not care to enter upon the consideration of the question whether a State can tax a debt due by one of its own citizens or municipalities to a non-resident creditor, or whether it has any jurisdiction over such a creditor, or over the credit he owns.[3]

In a later case this question was again considered by the court,[4] in one of the Virginia coupon cases, *supra*. It held that the act of Virginia requiring the tax on the bonds to be deducted from the coupons when tendered in payment of taxes could not be applied to coupons separated from the bonds and held by dif-

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[1] See *infra*, Chapter 14, "Situs of Property for Taxation."

[2] Champaign County Bank v. Smith, 7 Ohio St. 42; People v. Home Ins. Co., 29 Cal. 533.

[3] Justice Miller and Justice Hunt dissented, *supra*.

[4] Hartman v. Greenhow, *supra*.

ferent owners, without impairing the contracts made in the funding act, see *supra,* Sec. 56. The court remarked further, at p. 683:

"The power of the State to impose a tax upon her own obligations is a subject upon which there has been a difference of opinion among jurists and statesmen. On the one hand, it has been contended that such a tax is in conflict with and contrary to the obligation assumed; that the obligation to pay a certain sum is inconsistent with a right, at the same time, to retain a portion of it in the shape of a tax, and that to impose such a tax is, therefore, to violate a promise of the government."

It cited Hamilton on Public Credit, 3d vol., pp. 514-518,[1] and added that "on the other hand it is urged that the bonds of every State are property in the hands of its creditors and as such they should bear their due proportion of the public burdens." But this question was not necessarily involved in the disposition of the case. The court continued:

"Whatever may be the wise rule—looking at the necessity of a commercial country for its prosperity, that its public credit should never be impaired, as to the taxability of the public securities, it is settled that any tax levied upon them cannot be withheld from the interest payable thereon."

This principle was applied in the United States Circuit Court of Louisiana,[2] where an injunction was granted restraining the assessment and collection of taxes upon judgments held by non-residents against the city of New Orleans, that is, an attempt by the city to collect taxes upon judgments against itself. The bonds on which the judgments had been recovered were specially exempted from taxation by the city charter, and the court held that the judgments were entitled to the same exemption, and that, independently of this, in the absence of any provisions in the contract giving the right to impose a tax, it could not be imposed upon non-residents without impairing the obligation itself.

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[1] See Murray v. Charleston, 96 U. S. 432, *supra,* and Foreign Held Bands Case, 15 Wall. 300, *supra,* Sec. 78.

[2] De Vignier v. New Orleans, 16 Fed. Rep. 11.

§ 80. **Contract Right to Tax As a Remedy.**—The contract clause of the Constitution has been applied to another class of cases, where parties have been adjudged entitled to a levy of taxes in the enforcement of claims against municipalities. Here was involved the same principle which was enforced in the Virginia coupon cases, as the principle applied in both classes of cases is the familiar rule that the remedy for the enforcement of the contract existing when it is made enters into it, and cannot be destroyed or prejudicially affected, without impairing its obligation.[1] Thus when a municipality is authorized to incur debts and issue bonds, the power of taxation then existing is part of the contract within the meaning of the Constitution, and a subsequent statute which repeals or restricts the power of taxation is an impairment of such contract.

The leading case on this subject is Von Hoffman v. Quincy,[2] where the statute of Illinois at the time the bonds were issued authorized the levying of a sufficient special tax to pay the coupons as they fell due, and this law was subsequently repealed, so that the only tax allowed to be levied was insufficient to meet the debt and current expenses of the city. The court said that the power of taxation thus given was a contract within the meaning of the Constitution and could not be withdrawn until the contract was satisfied, and that it was the duty of the city to impose and collect the taxes in all respects as if the second statute had not been passed, and this duty would be enforced by mandamus. This ruling has been followed in numerous cases involving the enforcement of taxation for the payment of municipal bonds.[3]

In the case last cited it was argued that the power of taxation belongs exclusively to the legislative department of the government, that the extent to which it may be delegated to municipal bodies is a matter of discretion, and that in general the power may be revoked at the pleasure of the legislature. But the court

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[1] Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143 (1843).

[2] 4 Wallace 535, 18 L. Ed. 403 (1867).

[3] Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395 (1881); Louisiana v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090 (1882).

said that legislation revoking the power of taxation was subject to the qualification that attends all State legislation, that it shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. It was urged in Louisiana v. Pilsbury that the people of New Orleans had been impoverished by the abolition of slavery and disabled from performing the contract according to its terms. The court said that the obligation of the city to perform its contract was no more lessened by the fact that there were no longer slaves to be taxed, than it would be by the destruction of any other portion of the taxable property, although the taxation on what was left might be thereby increased.

Thus a statute of Missouri providing that no tax other than for current expenditures and schools and interest on the State bonds should be levied without an order of the Circuit Court, was void as to bonds issued prior to its enactment.[1]

§ 81. **Remedy May Be Changed, if Substantial Right Not Impaired.**—The principle repeatedly enforced by the court has been declared in these words (122 U. S., p. 294):

"It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void."[2]

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[1] United States v. Lincoln County, 5 Dillon 184; United States v. Johnson County, 5 Dillon 207; Ralls County Court v. United States, 105 U. S. 733, 26 L. Ed. 1220 (1882); see author's "Taxation in Missouri," pp. 71 to 81, as to conflict between State and Federal courts on this question in State of Missouri.

[2] Seibert v. Lewis, 122 U. S. 284, 30 L. Ed. 1161 (1887), Louisiana v. New Orleans, 102 U. S. 203, 26 L. Ed. 132 (1880), affirming 32 La. Ann. 493; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. Ed. 403 (1867);

But where the charter of the city was repealed and the State had taken control and custody of her public property and assumed the collection of the taxes previously levied, the Supreme Court held that the taxes levied before the repeal of the charter that were not paid could not be collected through the instrumentality of a court of chancery at the instance of creditors of the city. Such taxes could only be collected under authority of the legislature.[1]

On the other hand, contract obligations created by State statute, exempting a bank from any other taxes than those therein prescribed, are not impaired by a subsequent statute changing the date when the bank is to report its property for assessment; the effect of which is to impress a lien upon its property which continues, notwithstanding the repeal of its charter before liability under the former statute attached, and the transfer of its assets to another bank organized for the purpose of taking them over.[2]

Where therefore a municipal corporation is authorized to contract and exercise the power of local taxation to meet such contractual engagements, this power must continue until the contracts are satisfied, and it is an impairment of the obligation of the contract to destroy or lessen the means by which it can be enforced.[3]

It was said by the Supreme Court:[4]

"The obligation of a contract, in its contractual sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. . . .

Morgan v. Town Clerk, 7 Wall. 610, 19 L. Ed. 204 (1869); Morgan v. Beloit, 7 Wall. 613, 19 L. Ed. 203 (1869); Stuart v. Jefferson Police Jury, 116 U. S. 135, 29 L. Ed. 588 (1885), affirming 34 La. Ann. 673.

[1] Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197 (1880), Justices Strong, Swayne and Harlan dissenting.

[2] Bank of Kentucky v. Kentucky, 207 U. S. 258, 52 L. Ed. 197 (1907), affirming 29 Ky. Law Rep. 643.

[3] Louisiana *ex rel* v. New Orleans, 215 U. S. 170, 54 L. Ed. 144 (1909), reversing 119 La. 623.

[4] Louisiana v. New Orleans, 102 U. S. 203, 26 L. Ed. 132 (1880).

Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.''

This principle has been applied in compelling the assessment of property at its full value, so that sufficient taxes can be raised thereunder to pay the judgment.[1]

§ 82. **Contractual and Governmental Legislation Distinguished.**—While the State may by legislative act exempt from taxation, if not prohibited by the State constitution, such exemption can only be effected by contractual, as distinguished from governmental, legislation.

Thus a statute of a State taxing inheritances does not impair any contract rights of inheritance, even if such an act could be construed as a change in the law of succession, rather than as a fiscal imposition, and could not be held to violate the Constitution of the United States.[2] Neither does the enactment of an inheritance tax law constitute a contract between the State and the person living at the time of its enactment, that if he shall die while the law is in full operation and unchanged, he may dispose of his estate without the imposition of any further tax upon any rights or interests acquired under his will than the tax imposed by law.[3]

§ 83. **Municipal Charter Powers Not Contractual.**—An act of New Jersey, providing that certain property of New Brunswick, used for charitable purposes, should be subject to taxation by the township in which it was located, was an exercise of governmental power and subject to repeal.[4] It did not create a

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[1] Huidekoper v. Hadley, 177 Fed. 1, 40 L. R. A. 505, C. C. A. 8th Cir. (1910), and same court in U. S. *ex rel* v. Jimmerson, 222 Fed. 489, (1915). Also City of Cleveland, Tenn. v. U. S. (1909) C. C. A. 6th Cir. 106 Fed. 677. See *infra*, Sec. 552.

[2] Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127 (1855), affirming 16 Pa. 63; Orr v. Gilman, 183 U. S. 278, 46 L. Ed. 196 (1902), affirming 167 N. Y. 227, 52 L. R. A. 433.

[3] *In re* Vanderbilt, 50 N. Y. App. Div. 246.

[4] Williams v. New Jersey, 130 U. S. 189, 32 L. Ed. 915 (1888).

contract between the State and the township. The conferring such rights of taxation is the exercise by the legislature of a public and governmental power; it is the imparting to the township of a portion of the power belonging to the State, which it can lawfully impart to a subordinate municipal corporation. But from the very character of the power it cannot be imparted in perpetuity, and is always subject to revocation, modification and control by the legislative authority of the State.

There is no contract between citizens and taxpayers of a municipal corporation and the corporation itself that the former shall be taxed only for the use of this corporation, which is impaired by subjecting them to taxation for the use of a new municipality formed by the annexation of other property under authority of law of an adjoining municipality.[1]

§ 84. **State Exemption of Municipal Property Not Contractual.**—An act of Kentucky exempted from State, county and city taxation the water works of the city of Covington. The Kentucky Court of Appeals held that the water works were the proprietary property of the citizens as distinguished from the property held for public or governmental purposes, and were therefore subject to taxation under the new constitution, notwithstanding the exemption of all public property used for public purposes. The Supreme Court[2] accepted this construction of the Kentucky statute, though it doubted the soundness of the ruling that the water works were not held for governmental purposes. But it agreed with the Kentucky court that the exemption from taxation by the terms of the act, was not irrepealable; and said further that, if the property was held in a governmental, not a proprietary sense, the power of the legislature as to such property was still supreme, and that the charter of a municipal corporation is in no sense a contract between the State and the corporation.

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[1] Hunter v. Pittsburgh, 207 U. S. 171 (1907), 52 L. Ed. 151, affirming 217 Pa. 27.

[2] Covington v. Kentucky, 173 U. S. 231, 38 L. Ed. 962 (1894), reversing 15 Ky. L. Rep. 320.

§ 85. **State Control of Proceeds of Municipal Taxation.**—The distinction between the relation of the State to municipal corporations and to individuals was illustrated in a decision of the Supreme Court,[1] that a State, unless restrained by the provisions of its constitution, can direct a restitution to the taxpayers of a county or other municipal corporation of property exacted from them by taxation, in whatever form the property may be changed, so long as it remains in the possession of the municipality. The county in that case had, under legislative authority, subscribed to stock in a railroad company to be paid by a special tax levied for that purpose. The legislature enacted a law providing that the railroad company should issue to the taxpayers certificates for the taxes paid, which were made assignable, and it was made the duty of the company to issue certificates of paid-up capital stock to the amount of the certificates of taxes paid when surrendered. The stock unclaimed was issued to the common school fund. The act declared that the issuing of the stock to the individuals or townships should cancel *pro tanto* the stock held by the county. The county claimed that the act impaired the obligation between it and the railroad, but the Supreme Court held that it was within the constitutional power of the State, although the invalidity of the act would not be a matter of serious doubt between the State and private individuals.

§ 86. **Retrospective Legislation and Vested Rights.**—This principle of distinguishing between governmental and contractual legislation has been applied in numerous cases. Thus, the holders of tax certificates have no vested rights impaired by requiring them to give written notice to the occupants of the land of application for tax deeds. The court saying:[2]

"That a statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867,

[1] Board of Commissioners v. Lucas, 93 U. S. 108, 23 L. Ed. 823 (1876).

[2] Curtis v. Whitney, 13 Wall. 68, 20 L. Ed. 513 (1871), affirming 24 Wisc. 664. See Coulter v. Stafford, 6 C. C. A. 18, 56 Fed. 564; also Essex Public Road Board v. Skinkle, 140 U. S. 334, 35 L. Ed. 446 (1891), affirming 49 N. J. L. 641.

which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made and enhance the cost and difficulty of performance, or diminish the value of such performance by the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force."

This principle is further illustrated by a case from New York,[1] where a statute modified, in the taxpayers' favor, previous laws of limitation concerning lands sold for non-payment of taxes. The statute had therefore provided that any person might, at the sale for taxes, on advancing the amount of the unpaid taxes, have a lease of the premises for a stated number of years. This was amended by providing that, where the sale for taxes had been made more than eight years prior to the passage of the act, no action should be maintained to compel the delivery of a lease unless commenced within six months after the date of passage. This was claimed to be an impairment of a contract right, but the Supreme Court said that there was nothing in the Constitution of the United States which prevented the legislature of New York from prescribing the limitation for bringing suits where none had previously existed, or from shortening the time within which suits should be commenced to enforce existing rights under tax sales, provided the time prescribed by the new law was a reasonable one.

§ 87. **Justice Miller on Legislative Contracts.**—In another case where the court found a contract in a railroad charter, it was said,[2] opinion by Justice Miller, l. c. p. 113:

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[1] Wheeler v. Jackson, 137 U. S. 245, 34 L. Ed. 659 (1890), affirming 105 N. Y. 681.

[2] New Jersey v. Yard, 95 U. S. 104, 24 L. Ed. 352 (1887), reversing 38 N. J. L. 472; N. Y. *ex rel.* Schurz v. Cook, 148 U. S. 397, 37 L. Ed. 498 (1893), affirming 110 N. Y. 443; Marx v. Hanthorn, 30 Fed. 579. In this last case, held that while the legislature may make recitals

"It may safely be said that in far the larger number of cases brought to this court under that clause of the Constitution, the question has been as to the existence and nature of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts,—contracts found in statute laws of the State, if they existed at all. It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution."

After saying that it is always difficult to determine when a statute constitutes a contract, the court said:

"This has always been a very nice point; and, when the supposed contract exists only in the form of a general statute, doubts still recur, after all our decisions on that class of questions." . . .

"Statutes fixing the taxes to be levied on corporations, partake, in a striking manner, of this dual character, and require for their construction a critical examination of their terms, and of the circumstances under which they are created.

"The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the rights of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

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of regularity of prior proceedings in tax deeds *prima facie* evidence, it cannot make them conclusive evidence of those proceedings, which are essential to the validity of the transaction, without impairing the obligation of the contract with the purchaser of the property; but *aliter* as to non-essentials or matters of routine. Sioux City R. R. Co. v. Sioux City, 138 U. S. 98, 34 L. Ed. 898 (1891), affirming 78 Iowa 367; Garrison v. City of New York, 21 Wall. 196, 22 L. Ed. 612 (1875); Armstrong v. Athens County, 16 Peters 281, 10 L. Ed. 965 (1842), affirming 10 Ohio 235; Covington v. Kentucky, *supra*, Sec. 84; State v. Weyerhauser, 72 Minn. 519, holding that a statute providing for the taxation of property previously unlawfully omitted from the assessment, or grossly undervalued, does not impair the obligation of a contract.

§ 88. **Tax Exemption Not Implied From License.**—A contract right of exemption cannot be implied from the grant of a ferry license,[1] nor from an exclusive street railway franchise,[2] nor for a license to practice law,[3] nor from a State license to an insurance company to do business in the State.[4]

An inviolable contract between a municipality and street railway companies which will prevent the exaction of a license tax under the acknowledged power of the municipality, is not created by ordinance passed in the exercise of authority to grant the use of the streets in which the companies have agreed to pay a certain sum for the use of such streets for a period, where such ordinance did not expressly relinquish the right to exact license fees or tax.[5]

The special municipal tax imposed by the laws of New York of 1899, Chapter 712, does not impair the obligation of the contracts by which the State or municipality granted the right to construct, operate and maintain street railways in the City of New York in consideration of the payment of a gross sum, or of the annual payment of a fixed amount, or a fixed percentage of the earnings where such payments are nowhere declared by any law a substitution for taxation.[6]

No exemption from the municipal taxation of the business of a street railway company results from the provisions in its agreement with the municipality, preserving its easement for railway purposes in land to be conveyed by it to the city granting it the right to lay down, construct, maintain and operate

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[1] Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. Ed. 419 (1883) affirming 102 Ill. 560.

[2] New Orleans Railroad Co. v. New Orleans, 143 U. S. 192, 36 L. Ed. 121 (1892), disapproving on this point Gordon v. Appeals Tax Court, *supra*.

[3] Baker v. Lexington (Ky.), 21 Ky. Law Rep. 809.

[4] Home Insurance Co. v. Augusta, 93 U. S. 116, 23 L. Ed. 825 (1876), affirming 50 Ga. 530.

[5] St. Louis v. United Railways Co., 210 U. S. 66, 52 L. Ed. 1054 (1908).

[6] New York *ex rel* Metropolitan Street Ry. Co. v. State Board of Tax Commissioners, 199 U. S. 1, 50 L. Ed. 65 (1905), affirming 174 N. Y. 417.

its lines of railway through certain streets, subject to the control of the Mayor and Aldermen.[1]

The same principle applies in the case of other municipal grants and franchises not relating to taxation, but to the exercise of the police power, and the general principle has been affirmed that general implication may not be resorted to for the purpose of converting a grant of the municipality, which is upon its face a mere license, into a contract for a stated period or perpetuity.[2]

§ 89. **Bounties and Privileges.**—Legislative grants of bounties or privileges, involving no reciprocal contractual obligations on the part of the grantee, confer no contractual rights. Thus the bounty and tax exemption granted to salt manufacturers in Michigan was held repealable,[3] as was also the exemption granted to manufacturers in the District of Columbia.[4]

§ 90. **Consideration for Exemption Essential.**—If the law is a mere offer of a bounty, it may be withdrawn at any time, although the recipients may have incurred expense on the faith of the offer. Thus an act of Louisiana, in exempting the hall of a Grand Lodge from State and parish taxes, as long as it was occupied as a Grand Lodge, was a mere continuing gratuity which the State had a right to withdraw by the adoption of a Constitution which in effect repealed the exemption.[5] The

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[1] Savannah, Etc., R. R. Co. v. Savannah, 198 U. S. 392, 49 L. Ed. 109, 1905, affirming 115 Ga. 137.

[2] Seaboard Air Line Railway v. Raleigh, 242 U. S. 15, 61 L. Ed. (1916).

For a case where a contract claim was sustained as to the rate of fare in annexed territory, see Detroit United Railway v. People of State of Michigan, *supra*, Sec. 70.

[3] Salt Co. v. East Saginaw, 13 Wallace 373, 20 L. Ed. 611 (1872).

[4] Welch v. Cook, 97 U. S. 541, 24 L. Ed. 1112 (1878).

[5] Grand Lodge v. New Orleans, 166 U. S. 143, 41 L. Ed. 951 (1897), affirming 46 La. Ann. 717. See also Rector of Christ Church v. Philadelphia, 24 Howard 300, 16 L. Ed. 302 (1860); Tucker v. Ferguson, 22 Wallace 527, 22 L. Ed. 805 (1875); West Wisconsin R. R. Co. v. Supervisors, 93 U. S. 595, 23 L. Ed. 814 (1876), affirming 35 Wis. 257; Newton v. Commissioners, 100 U. S. 548, 25 L. Ed. 710 (1888), affirming 26 Ohio S. 618.

court said there was the same necessity for a consideration to make a contract of exemption as there would be if it were a contract between private parties. See Sec. 50, *supra.*

§ 91. **Judgment for Torts Not Contract.**—Judgments were recovered against the city of New Orleans for damages done to property by a mob, the statutes of the State making municipalities liable for such damages. The new constitution, thereafter adopted, so limited the taxing power of the city as to prevent the plaintiffs from collecting their judgments, the funds receivable having been exhausted by current expenses.[1] This right to reimburse for damages caused by a mob, while a statutory right, was not founded upon any contract of the city and did not become a contract by being merged in a judgment, the court saying:

"The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence."

§ 92. **Tax Exemption Repealed Under General Power Reserved to Amend or Repeal.**—After the decision in the Dartmouth College case, holding that corporate charters are contracts protected by the Constitution, the practice became general in the States of inserting in corporate charters, whether contained in special acts or in general corporation laws, the reservation of the power to alter, amend or repeal. Where, in a charter granting an exemption from taxation, such reservation is made, whether it is contained in the act itself, or in the State statute controlling the terms of the act, it preserves to the State the right of amending or repealing the tax exemption, whenever the public interest as determined by the legislature requires.

Thus in a case from South Carolina, where the immunity from taxation was granted by an amendment of the original

[1] Louisiana v. Mayor of New Orleans, 109 U. S. 285, 27 L. Ed. 937 (1883).

charter of the railroad, and at the same time a general law of the State was in existence, providing that any charter subsequently granted, or any renewal, amendment or modification of a charter, should be subject to amendment, alteration or repeal by legislative authority, the court said,[1] that the original incorporators and the subsequent stockholders took their interests with the knowledge of the existence of this power and of the possibility of its exercise at any time, at the discretion of the legislature. The object of the reservations, just as is true of similar reservations in other charters, was to prevent a grant of corporate rights and privileges in any form which would preclude legislative interference with their exercise, if the public interest should at any time require such interference. The court added however, as to the effect of this reserved power, at page 459:

"Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the incorporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

This ruling has been followed in a number of cases.[2]

Whether an exemption from State taxation has been repealed by a subsequent State statute is a matter of State law upon

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[1] Tomlinson v. Jessup, 15 Wall. 454, 21 L. Ed. 204 (1873).

[2] Louisville Water Co. v. Clark, 143 U. S. 1, 36 L. Ed. 55, affirming 90 Ky. 915 (1892); Railroad Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836 (1878); Hoge v. Railroad Co., 99 U. S. 348, 25 L. Ed. 303 (1879); New York, Etc., Railroad Co. v. Bristol, 151 U. S. 556, 38 L. Ed. 269 (1894), affirming 62 Conn. 527. In the last case the court repeated what had been said in previous cases, p. 567: That a power reserved to the legislature to alter, amend or repeal charters, authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it and which the legislature may deem necessary to secure that object or any public right. The power of alteration and amendment is not without limitation, but must be in good faith and

which the decisions of the highest courts of the State in the absence of any errors, are binding upon the Federal courts.[1]

§ 93. **Tax Exemptions Strictly Construed.**—A contract for exemption from taxation must not only be founded upon a consideration, but it must be clearly stated and will not be inferred from facts which do not irresistibly point to the existence of a contract.[2] This principle has been applied in numerous cases. Thus the exemption of a railroad from taxation does not extend to the branches of the road constructed under a subsequent act.[3] The exemption of the property and effects of a railroad company does not extend to property other than that used in the business of the company, nor to the land of the company.[4] Where a bank was to pay an annual tax upon its shares, which was to be in lieu of all other taxes, and it was authorized to hold real estate sufficient for its place of business, the immunity from taxation extended only to so much of the building as was required for the actual wants of the bank.[5] Where the

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consistent with the specified object of the charter. See Jackson, J., afterwards Justice of the Supreme Court in Hill v. Railroad Co., 41 Fed. 610; San Joaquin & Kangs River Co. v. Stanislaus County, 113 Fed. 930, in the Circuit Court Northern District of California; Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357 (1877).

See also Northern R. R. Co. v. Maryland, 187 U. S. 258, 47 L. Ed. 167 (1902), affirming 93 Md. 737, where a statute fixing the rate of taxation in the settlement of a pending controversy was held subject to the State Constitution reserving the power to repeal, alter, or amend corporate charters.

[1] Wycomico Co. Com. v. Bancroft, 203 U. S. 102, 51 L. Ed. 112, reversing 135 Fed. 977 (1906).

[2] Wells v. Savannah, 181 U. S. 531, 45 L. Ed. 986 (1901), affirming 107 Ga. 1.

[3] C. B. & Kansas City R. Co. v. Guffey, 120 U. S. 569, 30 L. Ed. 732 (1887), affirming 89 Mo. 523; Ford v. Delta & Pine Land Co., 164 U. S. 662, 41 L. Ed. 590 (1897), affirming 43 L. Ed. 181 (1897); Southwestern R. Co. v. Wright, 116 U. S. 231, 29 L. Ed. 626, affirming 68 Ga. 311 (1885), Wilmington & Weldon R. Co. v. Alsbrook, 146 U. S. 279, 36 L. Ed. 972 (1892), affirming 110 N. C. 137.

[4] Ford v. Delta & Pine Land Co., *supra*; Tucker v. Ferguson, *supra*; Railroad Co. v. Loftin, 105 U. S. 258, 26 L. Ed. 1042 (1882).

[5] Bank v. Tennessee, 104 U. S. 493, 26 L. Ed. 801 (1882).

exemption from taxation is limited in time, or is to continue only until the happening of a certain event, as the completion of the railroad, such limitation is strictly enforced.[1]

An exemption for a definite time is equivalent to the express power to tax after that time.[2]

§ 94. **"Immunity" and "Privilege" Distinguished.**—The later decisions of the court in requiring that the contract of exemption must be clearly stated, are materially more stringent. It was said by the court,[3] l. c. page 179:

"It cannot be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far as the results arrived at by the court can be seen to be founded on a real difference in the meaning of such language."

In this case the plaintiff had been chartered with "all the rights and privileges" of another company, which in turn had been granted "all the rights, privileges and immunities" of a third company, the last having a limited exemption from taxation. The court said that this did not give the first named company any exemption. Exemption from taxation is more accurately described as an "immunity" than as a "privilege," and the later opinions of the court show that there must be other language than the mere word "privilege," or other provisions in the statute removing all doubt as to the intention of the legislature, before the exemption will be admitted. The court conceded that some of its earlier decisions are inconsistent with this ruling.[4] It laid stress in this case upon the absence of the word "immunity."

In another case decided at the same time[5] the court held

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[1] Bailey v. Magwire, 22 Wallace 215, 22 L. Ed. 850 (1874).

[2] Railroad Co. v. Gaines, 97 U. S. 697, 24 L. Ed. 1091 (1878); Vicksburg R. Co. v. Dennis, 116 U. S. 665, 29 L. Ed. 770 (1885), affirming 34 La. Ann. 954.

[3] Phoenix Fire & Marine Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. Ed. 660 (1896).

[4] Humphreys v. Pegues, *supra;* Tennessee v. Whitworth, *infra.*

[5] Home Insurance Co. v. Tennessee, 161 U. S. 198, 40 L. Ed. 669 (1896).

that, where a company was organized with "all the powers, rights, reservations and liabilities of another company," the former was not entitled to the limitation of taxation provided in the charter of the latter company.

Incorporating a railroad company with power to exercise all the powers and privileges conferred by an earlier act incorporating another railway company does not confer upon the new corporation any immunity from taxation enjoyed by the earlier company under its charter.[1]

§ 95. **Lost by Change of Corporate Business.**—So also an exemption granted to a corporation for the transaction of a particular business, is lost by a charter change in the business accepted by the corporation. Thus an insurance company with a chartered limitation of taxation, secured a change of its corporate business and objects to those of a bank. Prior to this the new constitution of the State had prohibited all exemption. This change from insurance to banking was material and radical and the exemption was lost.[2]

§ 96. **Lost by Repeal Before Incorporation or Issue of Stock.**—A corporation chartered before the adoption of a new constitution but not actually organized until after its adoption, was subject to the provisions of the new constitution, which nullified the tax limitation contained in the charter.[3]

And new stock issued after the adoption of a constitution forbidding tax exemptions is not entitled to the exemption from taxation granted to the original stockholders.[4]

§ 97. **Tax Exemption is a Personal Immunity.**—A contract of tax exemption is an immunity personal to the grantee, and

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[1] Wright v. Georgia, Etc., R. R. Co., 216 U. S. 420, 54 L. Ed. 544 (1910), modifying the decision on this point of 132 Fed. 912.

[2] Memphis City Bank v. Tennessee, 161 U. S. 186, 40 L. Ed. 664 (1896).

[3] Planters' Insurance Co. v. Tennessee, 161 U. S. 193, 40 L. Ed. 667, affirming 95 Tenn. 203 (1896).

[4] Bank of Commerce v. Tennessee, 163 U. S. 416, 41 L. Ed. 211 (1897).

cannot be enforced by an assignee or purchaser at foreclosure sale or otherwise, unless the right to assign such immunity is clearly given in the grant.[1]

Thus in the case of a railroad corporation exempted from taxation upon its property and purchased at sale in foreclosure by a company declared by statute to succeed to all the franchises, rights and privileges of the first company, the immunity from taxation did not pass to the purchaser.[2] It was urged that it passed under the word "franchise;" but on this point the court said, quoting Morgan v. Louisiana, 93 U. S. 217, 223, l. c. page 185:

"Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

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[117] Trask v. Maguire, 18 Wall. 391; Morgan v. Louisiana, 93 U. S. 222, 23 L. Ed. 860 (1876), affirming 28 La. Ann. 482; Railroad Co. v. Hamblen, 102 U. S. 273, 26 L. Ed. 152 (1880); Wilson v. Gaines, 103 U. S. 417, 26 L. Ed. 401 (1881); L. & N. R. R. Co. v. Palmes, 109 U. S. 244, 27 L. Ed. 922 (1883), affirming 19 Fla. 231; Memphis Railroad Co. v. Commissioners, 112 U. S. 609, 28 L. Ed. 837 (1884), affirming 41 Ark. 436; Picard v. Tennessee, Etc., R. Co., 130 U. S. 637, 32 L. Ed. 1051, reversing 20 Fed. 614 (1889); C. & O. R. R. Co. v. Miller, 114 U. S. 176, 29 L. Ed. 121 (1885), affirming 19 W. Va. 408.

[118] C. & O. R. R. Co. v. Miller, *supra.*

§ 98. **Exemption not Assignable.**—The rule concerning the transfer of an immunity from the exercise of the governmental power, was thus declared by the Supreme Court:

"'Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the state may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits, to a successor. . . . But the State, by virtue of the same power which created the original contract of exemption, may either by the same law, or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken not by reason of the inherent right of the original holder to assign it, but by the action of the State in authorizing or directing its transfer. As in determining whether a contract if exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed, every doubt is resolved in favor of the continuance of the governmental power, and clear and unmistakable evidence of the intent to part with it is required.'"[1]

This was said by the court with reference to an exemption of a canal company from a paving obligation, and it was held that a transfer under legislative authority of the "estate, property, privileges, and franchises" of one corporation, did not vest in the transferee the freedom from exercise of governmental power which the former enjoyed under its charter.

This language was subsequently quoted *in extenso* and adopted by the court as "lucidly stating" the rule concerning the transfer of rights of exemption from taxation.[2]

§ 99. **Exemption, When Applicable to Lessee or Assignee.** While the law is thus settled that tax exemptions or tax limita-

[1] Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. Ed. 784, affirming 182 N. Y. 99, 70 L. R. A. 773 (1907).

[2] Morris Canal & Banking Co. v. Baird, 239 U. S. 126, 60 L. Ed. 177 (1915).

tions are personal to the grantee, that is, are not transferable and do not run with the property unless the sovereign granting the exemption has explicitly provided otherwise, it is also a well recognized exception, as set forth in the preceding section, that this exemption may be extended to a lessee or other assignee by the authority granting the same. In the absence of such authority in case of a lease the exemption extends only to the interest of the lessor,[1] and in such case, the interest of the lessee is subject to taxation when the law provides therefor. Where, however, the state granting the exemption directly authorizes the lease, and continues thereafter to collect taxes under the limitation set forth in the original charter, where that provided a distinct limitation of the tax, and this practical construction was given to the law for nearly half a century, the court said that this warranted the conclusion that the exemption extended in favor of the lessees as well as the lessors. [2]

This did not mean that the exemption in the charter passed by assignment to the lessees, or that the property was exempted generally into whosever hands it might come.

The railway property exempted from other than a specified tax on annual income in the possession of certain railways, under a lease permitted and encouraged by the lessor's charter, included betterments and improvements of the demised road acquired to meet the necessities of its business.[3]

§ 100. **Exemption Not Extended to Party Not Entitled to Rely Thereon.**—Although a charter contract express in its character may arise from the acceptance of or an action under the charter which grants such exception, the principle does not extend to a case where incorporation was made under no promise of such an exemption and it could not have been relied upon, in undertaking the work for which the company was organized. This

[1] Jettson v. University of the South, 208 U. S. 582, 52 L. Ed. 481 (1908), reversing 155 Fed. 182.

[2] Wright v. Central of Georgia R. Co., 236 U. S. 674, 59 L. Ed. 781, affirming 206 Fed. 107.

[3] Wright v. L. & N. R. Co., 236 U. S. 687, 59 L. Ed. 788 (1915), modifying and affirming 201 Fed. 1023.

principle was applied to a case where a statute extended to a college in New Jersey the privilege which had been granted to another institution which had been exempted from taxation. This, however, was at a time when an act was in force providing that any charter should be subject to alteration, suspension and repeal in the discretion of the legislature. The court said that after this privilege was extended to the Seton Hall College it made no new promises and assumed no new burdens. The Supreme Court therefore affirmed the judgment of the State court that no repealable contract had been entered into.[1]

§ 101. **Railroad Consolidations and Tax Exemptions.** — This principle has been applied in numerous cases of railroad consolidations. If the consolidation of two companies does not necessarily work a dissolution of both and the creation of a new corporation, and the two companies retain their original status toward the public and the State, the exemption may continue as if the consolidation had not taken place, limited however, to the corporate property on which it was originally granted.[2]

Thus where two railroad corporations, whose shares are by a State statute exempt from taxation in the State, consolidate themselves into a new company under a State law which makes no provision to the contrary, and issue shares in the new company in exchange for shares in the old companies, the same exemption applies.[3]

The same exemption applies where two companies, whose stock was exempt in one State, consolidated with a third company created under the laws of another State. The new stock issued is exempt from taxation in the former State, in the absence of a statute there to the contrary.[4] If the stock

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[1] Seton Hall College v. Village of South Orange, *supra*, Secs. 66, 76.

[2] Central Railroad & Banking Co. v. Georgia, 92 U. S. 665, 23 L. Ed. 757, reversing 54 Ga. 401 (1876); **Branch v. City of Charleston, 92 U. S. 677, 23 L. Ed. 750 (1876).**

[3] Tennessee v. Whitworth, 117 U. S. 129, 29 L. Ed. 830, affirming 22 Fed. 75 (1885). See also Tominson v. Branch, 15 Wall. 460, 21 L. Ed. 189 (1873).

[4] Tennessee v. Whitworth, 117 U. S. 139, 29 L. Ed. 833, affirming 22 Fed. 81 (1885).

of only one of the roads is exempt, however, the exemption will be limited to that part of the consolidated road.

But where the company enjoying an exemption is consolidated with another and dissolved in the new corporation, so that a new grant of the corporate franchise is made, such new corporation becomes subject to the provisions of the State statute prohibiting exemptions.[1]

A charter exemption from taxation which has ceased and become void for failure to construct the railroad within the time required by its charter cannot be revived by subsequent statute enacted when the State Constitution prohibited the granting of special privileges with respect to taxation, recognizing the legal existence of the railroad company at that time and waiving the right to declare a forfeiture. [2]

§ 102. **Corporate Exemption Limited to Specific Form of Taxation.**—In a series of cases known as the Tennessee Bank and Insurance Cases, the subject of the application of contract exemption to the different forms of corporate taxation was thoroughly considered.

Where the charter of a bank provided that it should pay a certain tax to the State on each share "which should be in lieu of all other taxes," a subsequent law imposing an additional tax on the shares in the hands of the shareholders was void. [3] The court enumerated in its opinion some of the different subjects of corporate taxation, and said that this enumeration shows the searching and comprehensive taxation to which such institu-

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[1] St. Louis, Iron Mtn. & So. R. Co. v. Berry, 113 U. S. 465, 28 L. Ed. 1055, affirming 41 Ark. 509 (1884); Railroad Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185 (1879); Yazoo & Miss. Val. R. Co. v. Adams, 181 U. S. 580, 45 L. Ed. 1011 (1901); Keokuk & Western R. R. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 450, affirming 99 Mo. 30 (1894).

[2] Great Western R. R. Co. v. Minnesota, 216 U. S. 206, 54 L. Ed. 446 (1910), affirming 106 Minn. 303. See also Yazoo, Etc., R. R. Co. v. Vicksburg, 209 U. S. 358, 52 L. Ed. 833 (1908).

[3] Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558, reversing 8 Baxter 539 (1877); three judges dissented, holding that the exemption was of the stock and property of the corporation and not of the shareholders.

tions are subjected where there is no protection by previous compact. In another case, Chief Justice Waite, for the court, said:[1]

"In corporations four elements of taxable value are sometimes found: 1, franchise; 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders."

§ 103. **The Property of Corporations and Shareholders Distinguished in Contracts of Exemption.**—The disposition of the Supreme Court in later cases to construe strictly all contracts of exemption is illustrated by its recognition and enforcement of the legal fiction of the distinction between the property of the corporation and the rights of the shareholders in such property. Thus, the court said[2] that, although there were expressions in the former opinions lending color to another view, there is a distinction between the capital stock of a corporation and the shares of stock of the shareholders, and the taxation of one is not the taxation of the other. So, where the charter required a banking corporation to pay to the State a certain annual tax on each share of capital stock, which should be in lieu of all other taxes, it was held that while this limited the amount of tax on each share of stock in the hands of the shareholders, it did not apply to nor cover the case of the capital stock of the corporation or its surplus or accumulated profits. On the contrary such capital stock, surplus and accumulated profits were liable to be taxed to the corporation as the State might determine.

It was claimed that a different ruling had been made in the case of Gordon v. Appeals Tax Court, *supra*, page 47, where it was said with reference to the taxation of the bank and the stockholders, "the aggregate could not be taxed without its having the same effect upon the parts that the tax upon the parts would have upon the whole." The court said that there was a difference in the language of the charter in the two cases.

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[1] Tennessee v. Whitworth, 117 U. S. 136, *supra*.

[2] Shelby County v. Union & Planters' Bank, 161 U. S. 149; 40 L. Ed. 650 (1896); Union & Planters' Bank v. Memphis, 49 C. C. A. 455.

"Giving to the Gordon case the full weight of authority for the point actually decided, it does not hold that language, such as we have in the case under consideration, operates to exempt both the capital stock of the corporation and the shares of stock in the hands of its shareholders from all taxation beyond that mentioned in the charter, and we are entirely unwilling to unnecessarily extend the authority of that case so as to cover the question here."[1]

The same principle has been applied when the capital of the bank has been exempted from taxation, so that this exemption did not extend to the property right of the shareholders.[2]

The act of Michigan of 1911 imposing a tax on the owners of stocks, bonds and other evidences of indebtedness of specially chartered railroads and requiring the railroads to pay the tax and to deduct the same from the interest, was held to impair the contract liability between the railroad company and the holders of its securities.[3]

§ 104. **Capital Stock and Surplus of Corporations.**—In another case, the charter provided for a tax of a certain amount on each share of stock, which should be in lieu of all other taxes, and the court said[4] that this only limited the amount of tax on each share of stock in the hands of the shareholders, and did not prevent the taxation of the surplus of the corporation.

The court said that the surplus is corporate property, and is distinct from the capital stock in the hands of the corporation. The exemption was not greater in its scope than the subject of the tax, it said, and added, page 147:

"Recognizing, as we do, that there is a different property in that which is described as capital stock from that which is described as corporate property other than capital stock, and remembering the necessity there is for a clear expression of the

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[1] Mr. Justice White dissenting. 42 L. Ed. 202, reversing 54 Fed. 73 (1897).

[2] New Orleans v. Citizens' Bank, 167 U. S. 371; Tennessee v. Whitworth, 22 Fed. Rep. 75.

[3] Detroit, Etc., R. R. Co. v. Fuller, 205 Fed. 86 (1913).

[4] Bank of Commerce v. Tennessee, 161 U. S. 134, *supra*.

intention to exempt before the exemption will be granted, we must hold that the surplus has not been granted exemption by the clause contained in the charter under discussion. The very name of surplus implies a difference. There is capital stock and there is a surplus over, above and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders.''[1]

§ 105. **Special Assessments.**—The State of Arkansas in order to encourage the reclamation of swamp and overflow lands, provided that they should be exempt from taxation for the term of ten years, or until they should be reclaimed, and issued transferable scrip receivable in payment for them. Subsequently they were subjected to both general and special taxes. The Supreme Court held that the exemption was valid as to both forms of taxation, and that the repeal impaired a contract made with the holders of the scrip issued by the State. It said that the law itself contemplated the building of levees and drains, and the exemption was intended to be exemption from taxation therefor.[2] But it was held in a later case [3] that this case was decided on its special facts, because special taxes were in contemplation of the parties in making the contract of exemption, and that it was competent for the State to exempt any particular property from the burden of either kind of taxation. But an exemption from taxation as a rule relates only to the burden of ordinary taxes, and does not include the cost of local improvements.

§ 106. **The Impairment of the Obligation of Private Contracts.**—While the litigated cases concerning the legislative impairment of the obligation of contracts relate, as a rule, to legislative contracts of exemptions from taxation, the constitutional protection, of course, extends to all contracts. It was held by the Supreme Court that the obligation of a contract of employment by a non-resident meat packing house to the resi-

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[3] As to enforcing the fiction of the distinct property-rights of the corporation and shareholders in respect to the taxation of Federal securities, see *supra*, Sec. 19.

[2] McGee v. Mathis, 4 Wallace 143.

[1] Ill. Central R. Co. v. Decatur, 147 U. S. 204, 37 L. Ed. 132 (1893).

dent managing agent at a weekly wage was not substantially impaired by the imposition upon him in the Georgia act of December, 1900, of a license tax of $200.00 upon the domestic business carried on by him.[1]

A contract of exemption from municipal taxation cannot be deduced from the covenant of a perpetual leaseholder that his municipal lessor is to pay the taxes which are to become due on the land, although the municipality possesses no power of taxation when the lease was made.[2]

The reduction of the estate resulting from the imposition of a transfer tax under the authority of the amendment to the general transfer tax law of 1897, upon which exercise by will of the power of assessment conferred by a deed executed prior to the passage of the act, does not involve the impairment of the obligation of a contract.[3]

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[1] Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, affirming 117 Ga. 969, decided 1905, the court saying the claim was hardly worthy of serious consideration.

[2] J. W. Perry Co. v. Norfolk, 220 U. S. 472, 54 L. Ed. 548, affirming 108 Va. 35 (1910).

[3] Chandler v. Kelsy, 205 U. S. 466, 51 L. Ed. 882 (1907).

CHAPTER III.

REGULATION OF COMMERCE.

§ 107. Express restraint upon taxing power of State.
108. Necessity for national control over commerce.
109. Mr. Madison on necessity of national control of commerce.
110. National control of commerce, the comprehensive limitation.
111. Gibbons v. Ogden.
112. Brown v. Maryland.
113. Original package rule.
114. License tax on importer also void as regulation of commerce.
115. Regulation of commerce during non-action of Congress.
116. Freedom of interstate commerce.
117. Consent of Congress to State regulation.
118. Judicial construction of "arrival" in State.
119. Duties on imports relate only to foreign imports.
120. Woodruff v. Parham.
121. Importations from other States taxable in original packages.
122. Tax must be without discrimination.
123. Taxability of goods from other States not affected by Leisy v. Hardin.
124. Original packages in interstate commerce as to State police authority.
125. What is an original package?
126. Theory of exemption of original packages from State laws.
127. The definition of "Original Package" reaffirmed.
128. Exemption only extends to importer.
129. Form of tax is immaterial.
130. Intent to export is insufficient to exempt from taxation.
131. Property in commercial transit.
132. Coe v. Errol.
133. Products moved in Interstate Commerce may be given a taxable *situs* in State.
134. Same rule in interstate as in foreign shipments.
135. Termination of commercial transit.
136. Inheritance tax on aliens not tax on exports.
137. License tax on foreign-exchange broker not tax on exports.
138. State taxing power in relation to imports and exports.
139. State tax on alien passengers is void.
140. State inspection laws and interstate commerce.

"The Congress shall have power . . . to regulate commerce with foreign nations and among the several States and with the Indian tribes." Const. U. S., Art. I, Sec. 8, Par. 3.

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imports laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." Const. U. S., Art. I, Sec. 10, Par. 2.

§ 107. **Express Restraint Upon Taxing Power of State.**— The strong feeling of jealousy against the national power which confronted the framers of the Constitution is illustrated in the fact that the only specific restraint upon the taxing power of the States, that against imposts or duties on imports and exports, is qualified by the provision that such imposts or duties may be laid with the consent of Congress and for the benefit of the national treasury. This qualified right to the States of levying duties and imposts may have been adopted as one of the compromises of the Constitution in overcoming the strong objection made by the States to the power of internal taxation given to Congress. But whatever the purpose, it has proven wholly superfluous, as no such duties and imposts have been laid since the foundation of the government. In view of the tremendous development of national commerce, it seems unlikely that this power will ever be exercised.

§ 108. **Necessity for National Control Over Commerce.**— The necessity for national control over commerce, both interstate and foreign, was the immediate occasion, and indeed the moving purpose, in the adoption of the Constitution of the United States. In the words of Chief Justice Marshall:[1]

"From the vast inequality between the different States of the confederacy as to the commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that

[1]Brown v. Maryland, 12 Wheat, 420, l. c. 438, 6 L. Ed. 678 (1827).

day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress."

In Cook v. Pennsylvania,[1] Justice Miller in the opinion of the Court says:

"A careful reader of the history of the times which immediately preceded the assembling of the convention that framed the American Constitution cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting. States having fine harbors imposed unlimited tax on all goods reaching the continent through their ports. The ports of Boston and New York were far behind Newport, in the State of Rhode Island, in the value of their imports; and that small State was paying all the expenses of her government by the duties levied on the goods landed at her principal ports. And so reluctant was she to give up this advantage, that she refused for nearly three years after the other twelve original States had ratified the Constitution to give it her assent.

"In granting to Congress the right to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, and in forbidding the States without the consent of that body to levy any tax on imports, the framers of the Constitution believed that they had sufficiently guarded against the dangers of any taxation by the States which would interfere with the freest interchange of commodities among the people of the different States, and by the people of the States with citizens and subjects of foreign governments."

§ 109. **Mr. Madison on Necessity of National Control of Commerce.**—The necessity of giving the central government the control over foreign commerce seems to have been conceded, even by the opponents of the Constitution. It was pointed out by Mr. Madison in the *Federalist*[2] that the national control

[1] 97 U. S. 566, l. c. p. 574, 24 L. Ed. 1015 (1879).

[2] Federalist, No. 42.

over interstate commerce was essential to make the control over foreign commerce complete and effectual. Thus he said (pp. 262-263):

"The defect of power in the existing confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States, which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain."

§ 110. **National Control of Commerce, the Comprehensive Limitation.**—Although the regulation of commerce was thus the great moving cause for the adoption of the Constitution, and was thoroughly discussed in the proceedings of the convention and in the *Federalist*, we find in neither any reference to any possible interference with the taxing power of the States growing out of such regulation. The far-reaching importance of national control over interstate and foreign commerce was

not, and could not be, foreseen. If there had been no provision in the Federal Constitution specifically restraining the States from levying duties or imposts on imports and exports, such limitation would have been implied, and would necessarily have grown out of the exclusive power given to Congress to regulate such commerce. This is clearly shown by the reasoning in McCulloch v. Maryland and Brown v. Maryland. In like manner, the power to levy duties upon foreign commerce would possibly be held included in the grant to Congress of exclusive jurisdiction over such commerce.

The important and comprehensive limitation upon the taxing power of the States therefore is that which is implied from and grows out of the control given by the Constitution to Congress over interstate and foreign commerce. As to the latter, we have the express prohibition against levying duties on imports or exports, and also the implied limitation growing out of the national control over foreign commerce. Commerce with foreign nations includes importing and exporting, and a State tax on imports or exports is necessarily an interference with foreign commerce. Thus, the great leading case of Brown v. Maryland, *infra,* is decided upon both of these grounds.

§ 111. **Gibbons v. Ogden.**—The relation of the commerce clause of the Constitution to the taxing power of the State cannot be understood without a clear apprehension of the judicial construction of that clause, and this begins with the great opinion of Chief Justice Marshall in Gibbons v. Ogden.[1] In this opinion, as in that of McCulloch v. Maryland, he cites no authorities, for there were none to cite. The grant by the State of New York of the exclusive right to navigate the waters of that State with boats propelled by fire or steam was held void, on the ground that it was against the coasting license granted by Congress, and was an interference with commerce between the States.

The opinion gave a broad and comprehensive construction of the term "commerce," which has been the basis of all subsequent

[1] 9 Wheaton, 1, 6 L. Ed. 23 (1824).

adjudications. The Constitution is one of enumeration, and not of definition. The power to regulate is the power to prescribe the rules by which commerce is to be governed, and this power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

As to the extent of the power of Congress in regulating commerce with foreign nations, it was said it would be very useless if it did not pass State lines. The commerce of the United States with foreign nations was that of the whole United States. If Congress had the power to regulate commerce, that power must be exercised wherever this subject existed.

It was argued there was a concurrent power to regulate commerce among the States as there was a concurrent power over internal affairs vested in the State and Federal governments. But the court said that the two grants were not similar in their terms or nature. In imposing taxes for State purposes, the States were not doing what Congress was empowered to do, but when the State proceeded to regulate commerce with foreign nations, or among the several States, it was exercising the very power granted to Congress and doing the very thing which Congress was authorized to do.

The Court said therefore that in any case of conflict in the regulation of commerce, the act of Congress was supreme and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. It was conceded that commerce between the several States was restricted to that which concerned more than one, as that internal commerce completed in the State could be considered as reserved for the regulation of the State itself.

§ 112. **Brown v. Maryland.**—The first application of these clauses of the Constitution to the taxing power of the State was in 1837 in the case of Brown v. Maryland, wherein another great opinion of Chief Justice Marshall declared the line of limitation between the exercise of State and Federal authority. In McCulloch v. Maryland, the exemption from State taxation of the means employed by the general government had been declared;

and in this case the same principle of Federal supremacy was extended to justify the limitation of a State's taxing authority by the national control over commerce.

The State of Maryland passed an act requiring every importer of foreign merchandise to take out a license, paying therefor fifty dollars. Conviction under the act was sustained by the Court of Appeals of Maryland, but it was declared unconstitutional by the Supreme Court, and the requirement of a license for conducting the business of an importer was held to come within the prohibition of a tax on imports, and to be also an attempted regulation of commerce.[1] As to the limitation of the State's taxing power by the paramount control of Congress over commerce, see *supra*, Section 9. Commenting upon the circumstances attending the adoption of the Constitution, the court said, l. c., p. 438:

"From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports." . .

In reply to the argument that the abuse of power was not to be apprehended, it was said, l. c., p. 439:

"Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State." . . .

It was urged that the tax was not upon the import, but upon the importer. But the Court said it was simply varying the form without varying the substance. A tax on the occupation of an importer was a tax on the importation, and must be paid in the end by the consumer, or by the importer himself. This the State had no right to do because prohibited by the Constitution.

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[1] 12 Wheat. 419, *supra* §98. The case was argued for Maryland by Mr. Taney, afterwards the successor of Chief Justice Marshall, and by Reverdy Johnson.

It was also urged that as the word "export" means to take goods out of the country, so does "import" mean only to bring goods in. As to this the court said that the United States had the same right to tax occupations as was possessed by the States. The right to import includes the right to sell, and a license upon the business of importer is a tax upon the right to sell and therefore prohibited.

§ 113. **Original Package Rule.**—The court admitted the difficulty of setting a definite time when the taxing power of the State should begin, but fixed it as beginning when the original package in which the goods have been imported is broken up or sold, and thus was laid down the "original package rule," which has been the subject of so much judicial discussion. On this point the court said, at p. 441:

"The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."[1]

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[6]Chief Justice Taney, the successor of Chief Justice Marshall, who appeared in this case as counsel for the State of Maryland, in his opinion in the License Cases, 5 Howard, 504, said at page 575, 12 L. Ed. 288 (1847); concerning this "original package" rule:

"I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as

§ 114. **License Tax on Importer also Void as Regulation of Commerce.**—The court held further that the act imposing a license was also void as an attempted regulation of commerce. Any charge on the introduction of the article into the country, and its incorporation with the mass of the property therein, must be hostile to the power of Congress, since an essential part of its regulation and the principal object of it is to prescribe the regular means for accomplishing that introduction and incorporation. This could not abridge the acknowledged power of a State to tax its own citizens, because that power is subject to the paramount authority of Congress. On the historical setting of the commerce clause and the occasion of its adoption, it was said, l. c., p. 445:

"The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress indeed possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influences of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feeble-

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other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the Court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of the provisions in the Constitution."

ness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not therefore matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

§ 115. **Regulation of Commerce During Non-action of Congress.**—In Gibbons v. Ogden, Congress had exercised its control over interstate commerce by granting a coasting license, and the decision of the court therefore was really based upon the invalidity of the exclusive grant by the State of New York as against the right granted by Congress. It was unnecessary therefore to decide the extent of the State's right, during the non-action of Congress, to exercise its police or taxing power, when such exercise might incidentally affect interstate commerce. This remained a *vexata quaestio*.[1]

Thus, in the License Cases, decided in 1847, where the question before the court was as to the validity of certain prohibitive or liquor license tax laws for some of the New England States, Chief Justice Taney said, at p. 578:

"The question, therefore, brought up for decision is, whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all State laws upon the subject null and void."

All of the judges concurred in holding the State laws valid; some however concurring on the ground that the license laws

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[1] New York v. Miln, 11 Peters, 102, 9 L. Ed. 648 (1837); License Cases, *supra*; Passenger Cases, 7 How. 283, 12 L. Ed. 702 (1849).

were merely police regulations, although they might incidentally affect commerce.

Later the rule was laid down, that the power to regulate commerce is one, which includes many subjects, various and quite unlike in their nature; and that whenever these subjects are in their nature national or require one uniform system or plan of regulation, they may be justly held to belong to that class over which Congress has exclusive power of regulation; but that local and limited matters, not national in their nature, as pilotage and the like, may be regulated by the States during the non-action of Congress. The action of Congress, however, renders void such regulations of the States as conflict with it.[1]

§ 116. **Freedom of Interstate Commerce.**—Finally, nearly fifty years after the decision in Brown v. Maryland, the doctrine of the License Cases was definitely overruled by the Supreme Court and the rule established, that where the subject is national in its character, and therefore in its nature requires uniformity of regulation affecting all the States, *e. g.*, interstate transportation, including the importation of goods from one State into another, Congress alone can act, and its non-action means that commerce must be free. This ruling was made with reference to the importation of liquors into a State, where the sale of such liquors was prohibited.[2] The freedom of transportation there declared extends to the goods in their original packages. Thus the "original package," as first introduced in Brown v. Maryland in reference to foreign importations, becomes material in interstate commerce in limiting the police power of the State. In Leisy v. Hardin the rule is thus formulated by the court:

"The absence of any law of Congress on the subject of equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unre-

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[1] Cooley v. Board of Wardens of Philadelphia, 12 Howard, 299, 3 L. Ed. 996 (1851).

[2] Bowman v. Railway Co., 125 U. S. 508, 31 L. Ed. 700 (1887); Leisy v. Hardin, 135 U. S. 100, p. 119 and cases cited, 34 L. Ed. 128 (1889).

stricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

§ 117. **Consent of Congress to State Regulation.** — After the decision in Leisy v. Hardin, Congress enacted a statute known as the Wilson bill, providing that liquors transported into any State or Territory, or remaining therein for use, consumption, sale or storage, shall, upon arrival in such State or Territory, be subject to the operation and effect of its laws, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors had been there produced, "and shall not be exempt therefrom by reason of being introduced therein the orginal packages or otherwise."[1] It was claimed that the act was invalid, because the Constitution guarantees freedom of commerce among the States in all things, and therefore Congress could not delegate its control over interstate commerce to the States. But the court said at page 561, that "in surrendering their own power over external commerce, the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress."

§ 118. **Judicial Construction of "Arrival" in State.**—In a later case,[2] the court construed this statute as not applying to goods while in transit in the State before delivery to the consignee. It was claimed that, if the act was construed to apply to the goods the moment they reached the Iowa line and before the consummation of the contract of shipment, it would give the statutes of Iowa extra-territorial operation and would render the Act of Congress repugnant to the Constitution. But the court said that its construction of the statute, according to which "ar-

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[1] 26 Stats. 313, c. 728. This act was approved August 8, 1890, and was held constitutional by the Supreme Court in In re Rahrer, 140 U. S. 545, 35 L. Ed. 572 (1890).

[2] Rhodes v. Iowa, 170 U. S. 412, 42 L. Ed. 1088 (1897). See *infra*, section 125, for more complete statement.

rival'' meant the completion of the shipment by delivery to the consignee, rendered it unnecessary to consider whether if the Act of Congress had submitted the right to make interstate commerce shipments to State control, it would be repugnant to the Constitution.

§ 119. **Duties on Imports Relate Only to Foreign Imports.**—Chief Justice Marshall said at the conclusion of the opinion in Brown v. Maryland:

"It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles."

The tax in this case, it will be remembered, was upon the business of a foreign importer. In 1860 a stamp tax imposed by the State of California upon a bill of lading for merchandise shipped from San Francisco to New York was held to be in effect a tax upon exports, and therefore invalid, the words "imports and exports" in the Constitution being assumed to include importations from one State into another. The opinion was by Chief Justice Taney.[1]

But in 1868 a tax levied in Mobile upon all sales of merchandise was claimed to be invalid, because it was laid on the sale of merchandise brought from other States while it remained in the original packages. It was urged that the case was controlled by the Almy case, *supra,* where the court had adopted the remark in the opinion in Brown v. Maryland, *supra.* But the court held, opinion by Justice Miller,[2] that the words "imports and exports" as used in the Constitution, had exclusive reference to foreign trade, and the State tax therefore was lawfully levied.

§ 120. **Woodruff v. Parham.**—With reference to the decision in Brown v. Maryland, the court said, at p. 130:

"That decision has been recognized for over forty years as governing the action of this court in the same class of cases; and

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[1] Almy v. California, 24 Howard, 169, 16 L. Ed. 644 (1860).

[2] Woodruff v. Parham, 8 Wallace, 123, 19 L. Ed. 382 (1868).

its reasoning has been often stated and received with approbation in others to which it is applicable. We do not now propose to question its authority or to depart from its principles. The tax of the State of Maryland, which was the subject of the controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is whether the provision of the Constitution to which we have referred extends, in its true meaning and intent, to articles brought from one State of the Union into another."

The court said further that the actual remark of Chief Justice Marshall in the opinion at the conclusion of Brown v. Maryland could only be received as an intimation of what the court might have decided, if such a case had ever come before it, and the remark might have referred only to the matter of discriminating taxes in domestic commerce.

The case of Almy v. California, *supra,* was also declared to have involved an interference with interstate, not foreign, commerce, although it was not so stated in the opinion. The court added: "We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made." As to the License Cases,[1] the court said it was very doubtful if any material proposition was decided, though the precise question involved in the case at bar was before the court and seemed to require solution. The words "imports and exports" are frequently used in the Constitution and have a necessary correlation, and the same words are used with reference to the taxing power of Congress. It was obvious that if articles brought from one State into another were exempt from taxation, even under the limited circumstances laid down in Brown v. Maryland, the grossest injustice must prevail and equality of the public burden in our large cities would be impossible. The application of this original package rule would practically exempt from all taxation the wholesale merchants who bought their goods in original packages.[2]

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[1] 5 Howard, 504, *supra.*

[2] Justice Nelson dissented, claiming that the absence of discrimination would be entirely worthless as a protection against the taxation of interstate commerce; that the coal of Pennsylvania could be taxed

§ 121. **Importations from Other States Taxable in Original Packages.**—The original package rule, therefore, as laid down in Brown v. Maryland, does not prevent the taxation of merchandise brought into one State from another, even though it remains in the original packages. In this respect such merchandise is sharply distinguished from foreign goods which are exempt from taxation while in the original packages and in the hands of the importer.

In later cases the ruling in Woodruff v. Parham has been reaffirmed. The principle was applied to shipments of coal from Pennsylvania by water to New Orleans, to be sold in open market there. It was held[1] that, though still on the river at New Orleans, it was intermingled with the general property in the State and subject to taxation, although it might be sold from the vessel, without being landed, and for the purpose of being taken out of the country on a vessel bound for a foreign port. It was subject to the taxing power of the State, because when the tax was levied, the coal was held in New Orleans for sale, and it was immaterial that thereafter some of it might have been sold for export. "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods intended for exportation."[2]

In Brown v. Houston, the court also said, at pp. 633, 634:

"When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being

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in New York, the salt and plaster of New York in Pennsylvania, the grain and flour of the West in Massachusetts, and the lumber of Wisconsin in Illinois, and so on.

[1] 114 U. S. 622, 29 L. Ed. 257 (1884); Pittsburgh, etc., Coal Co. v. Bates, 156 U. S. 577, 39 L. Ed. 538 (1894).

[2] The court added, p. 629: "Whether the last would be a duty on exports it is not necessary to determine."

there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States?'' . . .

§ 122. **Tax Must be Without Discrimination.**—But the tax must be without discrimination as between the domestic and non-domestic goods. While property brought in from other States, although remaining in the original packages, can be taxed, it must be taxed as property in common with other property in the State, and there must be no discrimination against it. On this point the court said, at p. 634, in the case last cited:

''We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of, and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other States. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of Woodruff v. Parham, which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner.

''When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State.''

§ 123. **Taxability of Goods from Other States Not Affected by Decision in Leisy v. Hardin.**—After the decision of the Supreme Court in Leisy v. Hardin, *supra*, wherein the whole subject of the power and jurisdiction of the State over property brought in from other States in the course of interstate com-

merce was examined, and the freedom of interstate commerce in the absence of congressional legislation asserted, the court was urged to overrule Brown v. Houston, on the ground that it had been in effect overruled by Leisy v. Hardin and other later decisions of the Supreme Court. In this case the coal, which had been brought down the river from Pittsburgh, was afloat at Baton Rouge in the original barges in which it had been exported from Pennsylvania. The court, however, reaffirmed its decision.[1] It said that as the coal was subjected to no discrimination in favor of the products of Louisiana, but treated in exactly the same way, the tax was valid. It was not a tax imposed upon the coal as a foreign product, nor by reason of its being brought to Louisiana, nor while it was in a state of transit through Louisiana.

This subject was again reviewed in American Steel & Wire Co. v. Speed,[2] when the court reaffirmed the rule declared in Woodruff v. Parham and in Brown v. Houston, and sustained a merchant's tax in Tennessee, which was levied upon goods which had been stored in the original packages in a warehouse and delivered therefrom to purchasers. The court said that the law on this subject had been foreclosed by prior decisions, and had in no wise been overruled by the decision in Leisy v. Hardin or Lyng v. Michigan. The court said that in these cases the question involved was the authority of the State to prohibit the introduction of goods from other States. These cases, therefore, related only to the assertion of State authority considered therein, that is, the right of exclusion in the exercise of the police power of the State.

In this case it was also held that a merchant's license tax of the State which included persons doing a like business with the steel company, involved no discrimination, although the Tennessee Constitution provided that no article manufactured of the produce of the State should be taxed otherwise than to pay inspection fee, where the highest court of the State held that this provision referred only to a direct levy of taxation upon articles

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1 Pittsburgh Coal Co. v. Bates, 156 U. S. 577, *supra*, Sec. 121.

2 192 U. S. 500, 48 L. Ed. 538 (1904), affirming 67 S. W. 806.

manufactured of the produce of the State, and that the merchant's tax applied equally to all merchants.[1]

§ 124. **Original Package in Interstate Commerce as to State Police Authority.**—It will be observed that there is a distinction between the taxing power of the State and its police power with reference to the original packages in interstate shipments. Under the rulings referred to, Leisy v. Hardin and Bowman v. Railway Co., *supra,* in the absence of legislation by Congress, commerce between the States must be free. The State therefore in the exercise of its police power cannot exclude the products of other States, even though it may conclude that they are injurious to its people; but when these products are admitted into the State they become subject to its taxing power equally with its own products. Thus, in a recent case,[2] the act of the State of Pennsylvania prohibiting the introduction of oleomargarine from another State and its sale in the original package was held void as an interference with interstate commerce. It was held that oleomargarine is a lawful article of commerce, and that, while a State can regulate its introduction so as to insure purity, it cannot wholly exclude it. The right of the importer to sell in the original package does not depend upon whether such package is suitable for retail trade or not. The court said, however, at p. 24:

"We do not say or intimate that this right of sale extended beyond the first sale by the importer after the arrival of the oleomargarine in the State."

But in a later case[3] the court sustained a conviction under the laws of Tennessee, for the sale of cigarettes in what were claimed to be original packages, on the ground that the size of

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[1] But see Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. Ed. 413 (1907); holding invalid the discrimination in Tennessee exempting property produced from the soil of Tennessee. Sec. 136, *infra.*

[2] Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49 (1897); Justices Harlan and Gray dissenting.

[3] Austin v. Tennessee, 179 U. S. 343, 45 L. Ed. 224 (1900).

the package was such as to indicate, under the circumstances, that it was prepared for the purpose of evading the law.

§ 125. **What is an Original Package?**—It is therefore necessary to determine what is an "original package," in regard both to importations from abroad and shipments from one State to another. In the case of foreign importations, the State cannot exclude nor can it tax either the business or the import, so long as the latter is in the hands of the importer in its original package. The State cannot exclude nor prevent the sale of shipments from another State in the original packages, but it can tax them when they come under the jurisdiction of the State, provided it does so without discrimination between that and the other property of the State. The determination of what is an original package therefore becomes important, both with reference to the police and taxing authority of the State.

In a case from Louisiana the Supreme Court held that the "original package" means the box or case in which the goods are shipped, and not the package in which they were placed by the manufacturer and manufactured, and before they were encased in the larger boxes for shipment.[1] Thus packages of lace, household linens, etc., were held to lose their exemption when taken out of the boxes or cases in which they were shipped. The court said that to extend the exemption to the manufacturer's packages would mean that the power of the State to tax imported goods would depend upon the form in which the European manufacturer or packer shipped them to this country. Thus if he shipped fifty Geneva watches, all he need do would be to put each watch in a separate case.

In the Pennsylvania oleomargarine case, *supra,* a ten-pound package of oleomargarine was held to be an "original package." But in Austin v. Tennessee the paper packages containing ten cigarettes unboxed or thrown loosely into baskets were held not

[1] May v. New Orleans, 178 U. S. 496, 45 L. Ed. 1165 (1899); affirming 51 La. Ann. 1064, four judges dissenting, Chief Justice Fuller and Justices Brewer, Shiras and Peckham.

to be "original packages" within the meaning of the court's decisions.[1] Justice Brown in the opinion says, at p. 359:

"The real question in this case is whether the size of the package in which the importation is actually made is to govern or the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view."

And after describing the packages he says, l. c., p. 361:

"And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discreditable subterfuge to which this court ought not to lend its countenance. If there be any original package at all in this case, we think it is the basket and not the paper box."[2]

§ 126. **Theory of Exemption of Original Packages from State Laws.**—In Austin v. Tennessee, the court explained the theory of the exemption in the original package as based upon the idea that the property is imported in the ordinary form in which from time immemorial foreign goods have been brought into the country. These had gone into the hands of wholesale dealers who had been in the habit of breaking up the packages and distributing their contents among retail dealers. The practice had grown up of sending goods in minute packages so as to bid defiance to the laws of the States against importation and sale. The court said that in such cases the original package rule had no application. The court concluded as follows:

"The consequences of our adoption of the plaintiff's contention would be far-reaching and disastrous. If the court adopts

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[1] In this case Justice White concurred in a separate opinion, and Justices Brewer, Shiras and Peckham and Chief Justice Fuller dissented.

[2] For discussion in the State courts of what is an "original package" see Commonwealth v. Schollenberger, 156 Pa. 201, reversed by the Supreme Court, *supra;* State v. Parsons, 124 Mo. 436, where separate medicine bottles boxed for shipment were held not to be original packages; Keith v. Alabama, 97 Ala. 32, 10 L. R. A. 430, where a similar ruling was made as to half-pint, pint and quart whisky bottles.

the contention of the manufacturer in evading the laws of a sister State, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial, anything is a package of cigarettes from an importer's case to a single paper box of ten, or even a single cigarette, if imported separately and loose; anything from a bale of merchandise to a single ribbon, providing only the dealer sees fit to purchase his stock outside of the State and import it in minute quantities."[1]

§ 127. The Definition of "Original Package" Reaffirmed. —In Cook v. Marshall County,[2] the Supreme Court reaffirmed this definition of the original package in sustaining a tax imposed on cigarette selling by the Iowa Code as applied to sales

[1] Justice White in his concurring opinion said that if he thought either the opinion or the conclusion had the effect of weakening the doctrine upheld by Leisy v. Hardin, 135 U. S. 100, *supra*, and Rhodes v. Iowa, 170 U. S. 412, *supra*, he would be unable to concur. But under all the circumstances he was constrained to conclude that each particular parcel of cigarettes was not an "original package" as defined by the previous adjudications of the court. Justice Brewer in his dissenting opinion, concurred in by Chief Justice Fuller and Justices Shiras and Peckham, said that the case was reversed on the single proposition of the size of the package of cigarettes, and that he searched the Constitution of the United States in vain for any intimation that the power of Congress over interstate commerce ceases when the packages in which that commerce is carried are of any particular size. And on page 381 he said: "Apparently the dividing line as to the size of packages must be somewhere between that of a ten pound package of oleomargarine and that of a package of ten cigarettes; but where? Must diamonds, in order to be within the protecting power of the nation, be carried from State to State in ten-pound packages?" And on the suggestion that diamonds are not a subject of police regulation, while cigarettes are, he says: "Concretely it amounts to this: the police power of the State, the power exercised to preserve the health and morals of its citizens, may prevent the importation and sale of a pint of whisky, but cannot prevent the importation and sale of a barrel; or in other words, the greater the wrong which is supposed to be done to the morals and health of the community, the less the power of the State to prevent it. That may be constitutional law, but to my mind it lacks the saving element of common sense." He said further that Chief Justice Marshall had said, in Brown v. Maryland: "'In the original form or package in which it was imported,' not in which 'it might have been' or 'ought to have been imported.' Obviously it did not occur to him that the form or package

at retail of packages of ten cigarettes in small pasteboard boxes sealed and stamped with the revenue stamp which had been shipped loose to the retailer from another State by an express company, which merely issued a receipt in duplicate showing the number of the packages and the name of the consignee, the packages not having separately the dealers' address, since such a box could in no sense be considered an original package.

The court reaffirmed the rule declared in the Austin case. The court said that this case differed from the Austin case only in the fact that there the packages were thrown loosely into baskets, and it was argued that the baskets might have been considered as the original package; that this method as well as that in the Austin case, was really devised for evading the police laws of the State.

§ 128. **Exemption Only Extends to Importer.**—The exemption from taxation of imported goods in the original packages applies only in favor of the importer, and therefore does not extend to the goods, even while they are in the original packages,

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which the importer might adopt in any way affected the power of Congress over the importation." The court, he continued, should not overlook the changes in the modes of transportation. At the time that Chief Justice Marshall wrote the opinion in Brown v. Maryland, transportation was carried on by water in sailing vessels, and on land largely in lumber wagons. It is not strange that at that time all transportation was of goods packed in large boxes, securely fastened to prevent accidents from the rough and tumble way of transportation. There were then no express companies for the carrying of small packages. All that mode of transportation has grown up in this country within the last sixty years. But the express companies carrying their small packages from State to State are just as certainly engaged in interstate commerce as the old-fashioned lumber wagons carrying commodities between the same places. The facilities of transportation are increasing rapidly, and with them the cost of such transportation is diminishing, so that more and more will it be true that the small packages will be the frequent subject of transportation as between State and State. He therefore insisted that it was for Congress, and not for the State, to make modifications in the rule, if circumstances required.

[2] 196 U. S. 261, 49 L. Ed. 471 (1905); affirming 119 Iowa 384. The Chief Justice, and Justices Brewer and Peckham dissenting.

after they have been sold by him. Thus, in Waring v. the Mayor [1] goods imported in the original packages were sold while still on the vessel, which was anchored in the harbor waiting for the lighters to load her cargoes and carry them to the town. They were held subject to taxation as the property of the purchaser, and such purchaser could be taxed upon his occupation or the amount of his sales. In this case the purchaser was in the habit of buying the entire cargo and selling it in the original packages to traders. Merchandise in the original packages when once sold by the importer is therefore taxable like other property, provided of course it is taxed without discrimination, as it has lost its distinctive character as an import.

Neither does an exemption apply to the cash on hand and notes held by a federal corporation doing business in New York as importers, though these were the proceeds of sales of imported goods in the original package.[2] The court said that such proceeds were not exempted from State taxation. They had lost their distinctive character which would give the right to the protection of the Federal Constitution, and as the business was carried on under the protection of the laws of New York, the capital was subject to taxation by the laws of that State.

§ 129. **Form of Tax is Immaterial.**—It is immaterial whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the importer which is subject to an *ad valorem* tax.[3] So the exemption extends to the goods in the original packages in the warehouse so long as they remain the property of the importer.[4] A tax is likewise invalid which is laid by a State on the amount of sales made by an auctioneer, when applied to the imported goods in the original packages.[5] An importer has the right not only to sell in person, but also to employ an agent to sell for him, and this right to sell

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[1] 8 Wallace, 110, L. Ed. 342 (1868).

[2] New York *ex rel* v. Wells, 208 U. S. 12, 52 L. Ed. 370 (1907), affirming 184 N. Y. 275.

[3] Low v. Austin, 13 Wallace, 29, 20 L. Ed. 517 (1871).

[4] Siegfried v. Raymond, 190 Ill. 424.

[5] Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015 (1879).

cannot be made to depend upon whether the original package is suitable for the retail trade or not, provided it is a *bona fide* package, not made for the purpose of evading the law.[1]

In Cook v. Pennsylvania, the court held that a tax on sales made by an auctioneer is a tax on the goods sold, within the terms of Waring v. The Mayor, and indeed of all the decisions cited; and when applied to foreign goods sold in the original packages by the importer, before they become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports.

§ 130. **Intent to Export is Insufficient to Exempt from Taxation.**—The fact that capital is uniformly and continuously employed in the business of purchasing goods for exportation from the United States to foreign countries is not sufficient to avoid an assessment on the ground that it is money employed in exportation, if such capital is in fact on hand as money on the day the assessment is made. The court said[2] that as it did not appear that the capital in question was actually invested in goods for export on that day, it was not necessary to decide what would have been the effect if it had been so invested.

§ 131. **Property in Commercial Transit.**—The same principle applies to the claim of exemption from taxation on the ground that property is actually in commercial transit. Property which is in commercial transit through a State has no *situs* for taxation therein, whether destined for another State or for foreign shipment. Any attempt therefore by a State to tax such property is a direct interference with interstate commerce. But the property must be actually in transit. Intent to export property or to send it to another State is not sufficient to exempt it from taxes.

It is not necessary that property should be actually on the cars or steamers, as it has been held to be in commercial transit when it is at the point of shipment awaiting loading. Thus also

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[1] See Schollenberger v. Pennsylvania, and Austin v. Tennessee, *supra*.

[2] People v. Commissioners, 104 U. S. 466, 26 L. Ed. 632 (1881).

delay within the State no longer than is necessary for convenient trans-shipment to its destination will not give the property a *situs* in the State, so as to subject it to the State's taxing laws. [1] Where corn had been removed from its place of production and placed temporarily in cribs to await loading on cars for shipment, it was held to have no taxable *situs* as property of the non-resident owner. [2]

This rule was applied to droves of sheep where they were driven from State to State by way of transportation to a market. The court said that the incidental grazing did not appear to have been material, and they might with equal propriety be taxed in each State traversed. [3]

The intent to export is not sufficient. [4] The goods must be actually in commercial transit.

§ 132. **Coe v. Errol.**—A leading and illustrative case on this point is Coe v. Errol. [5] The plaintiff, a resident of New Hampshire, owned spruce logs, drawn down during the winter before from the mountains of New Hampshire to the banks of a stream in the town of Errol, New Hampshire, thence floated down the river in the spring to the State of Maine. It was held that they were properly appraised for taxation in Errol.

The court decided, opinion by Justice Bradley, that the products of a State, though intended for exportation and partially prepared for that purpose, are liable to be taxed like other property at the point where they are deposited, and that they are not exempted from taxation by the owner's preparation to ship them; that this is not the case of goods in course of transportation through a State, though detained for a time therein by low water or other causes. When the products of the farm or forest

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[1] State v. Engle, 34 N. J. L. 425.

[2] Ogilvie v. Crawford County, U. S. Cir. Ct. of Iowa, 7 Fed. 745. The court distinguished the case of Carrier v. Gordon, 21 Ohio 605, as there the property was not in transit, but plaintiffs intended to remove it on the opening of navigation.

[3] Kelly v. Rhodes, 188 U. S. 1, 47 L. Ed. 359 (1903); reversing 9 Wyom. 352.

[4] Myers v. Baltimore County Commissioners, 83 Md. 385.

[5] 116 U. S. 517, 29 L. Ed. 715 (1886).

are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or railroad, such products are not yet in process of transportation, but they are a part of the general mass of property in the State, subject to its jurisdiction, in the same way as other property therein. They cannot be taxed as exports; they are not yet exported and may never be exported. The mere intention to export is not sufficient. The court declared that, if the intention to export were sufficient, in many States there would be nothing left to tax but real estate, and added, l. c., p. 528:

"Carrying it from the farm, or the forest, to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

§ 133. **Products Moved in Interstate Commerce May be Given a State Taxable Situs.**—The rule declared by the Supreme Court is that while the property is at rest for an indefinite time awaiting transportation, or awaiting at sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes a subject of interstate commerce and is exempt from local assessment.[1]

Thus coal shipped from Pennsylvania and dumped on the dock in New Jersey preliminary to trans-shipment to other States, was held not in transit under interstate commerce and therefore not exempt from State taxation.[2]

Grain shipped from southern and western States under contracts for its shipment to eastern States but afterwards purchased while in transit by a resident of Illinois with the intention

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[1] Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. Ed.. 394 (1903).

[2] Susquehanna Coal Co. v. City of South Amboy, 184 Fed. 941 (1911).

to forward it promptly according to shipping directions, after exercising the privilege reserved therein of removing it from the cars at Chicago for inspection, weighing and so forth, may be assessed for local taxation while actually in a private grain elevator in Chicago to which it had been removed for such purposes.[1] The court said that in that case the property so held within this State should be held for the owner for purposes assumed to be beneficial, and as it was not in actual transportation, there was nothing inconsistent with the Federal authority in compelling the owner to bear in common with other property in the State his share of the expenses of the local government.

Oil shipped from Pennsylvania and Ohio and destined ultimately for points in Arkansas, Louisiana and Mississippi, is not property in interstate commerce so as to be exempt from state tax or inspection laws, while it is held at a distributing point maintained by the shipper in Tennessee, at which point such oil is unloaded from the tank cars into various tanks, barrels and other receptacles, and from which it is forwarded to its final destination.[2]

It was declared, however, in this as in other cases, that personal property which is in transit in interstate commerce might not be subject to local taxation merely because the owner is a resident of the State and the property is within the limits of the county where the assessment was made.

§ 134. **Same Rule in Interstate as in Foreign Shipments.**— In its opinion in this case the court used the words "export" and "exportation" in reference to a shipment to another State, although it had already held in Woodruff v. Parham, *supra*, that the terms "imports" and "exports" as used in the Constitution in the clause under consideration referred only to foreign shipments. The principle is obviously the same whether the shipments are intended for another State or for a foreign coun-

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[1] Bacon v. Illinois, 227 U. S. 504, 57 L. Ed. 615 (1913); affirming 243 Ill. 313. As to the application of this principle to traveling circuses see Robinson v. Longley, 18 Nev. 71, 1 Pac. 377.

[2] General Oil Co. v. Crain, 52 L. Ed. 754, 209 U. S. 211 (1908); affirming 117 Tenn. 82.

try. In either case the goods must be actually in transportation or awaiting the means of transportation to be exempt from the taxing power of a State.

In a case decided at the following term,[1] the principle laid down in Coe v. Errol was considered with reference to the prohibition upon Congress in the Constitution against taxing exports. The court held that an excise laid on tobacco requiring it to be stamped before it is removed from the factory is not a duty on exports, even though the tobacco be intended for exportation. It stated that a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. "How can the officers of the United States, or of the State, know that goods apparently part of the general mass and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true and would lead to the greatest frauds." And the court added at p. 507:

"It is true, as was conceded in Coe v. Errol, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress. So that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other."

§ 135. **Termination of Commercial Transit.**—The subject of commercial transit was considered by the Supreme Court with reference to the police power of the State, the particular point in issue being the time when goods shipped into a State become subject to its police laws. It was held[2] that the statute of Iowa making it a misdemeanor for any express or railway company

[1] Turpin v. Burgess, 117 U. S. 504, 29 L. Ed. 988 (1886).

[2] Rhodes v. Iowa, 170 U. S. 412, 42 L. Ed. 1088 (1898).

to transport any intoxicating liquors from one place to another within the State, without being furnished a certificate from the county auditor that the consignee was authorized to sell such intoxicating liquors, could not be applied to a box of liquors shipped by rail from a point in Illinois to a citizen of Iowa at his residence in that State, while in transit from its point of shipment to its delivery to the consignee, without causing the Iowa law to be repugnant to the Constitution of the United States. Moreover, moving such goods in the station from the platform on which they were put on arrival to the freight warehouse was a part of the interstate commerce transportation. The court in this case construed the Act of Congress of August 8, 1890, *supra*, Section 117, providing that liquors transported into a State should upon arrival become subject to its laws. The court said that the word "arrival" did not mean arrival at the State lines, but arrival at their destination in the State and delivery there to the consignee. This construction of the statute rendered it unnecessary to consider whether, if the Act of Congress had submitted the right to make interstate commerce shipments to State control, it would be repugnant to the Constitution.[1] Although this decision was with reference to the police power of the State, the reasoning would seem equally applicable to the exercise of the taxing power. The decision turned, not upon the question of what constituted an original package, but upon whether the commercial transit was concluded. As it was not ended when it was in the freight warehouse of the railroad company awaiting delivery, it was still in commercial transit, and therefore not subject to either the taxing or the police laws of the State.

§ 136. **Inheritance Tax on Aliens Not Tax on Exports.**— A law of Louisiana imposed a tax of ten per cent upon the inheritance going to any person not domiciliated in that State and not a citizen of any State or Territory in the Union. It was claimed that this was essentially a tax upon exports, and repug-

[1] Justices Gray, Harlan and Brown, dissenting, said that there had been an arrival in the State so as to subject the liquor to the exercise of the police power of Iowa within the letter and spirit of the Act of Congress.

nant to the power of Congress to regulate commerce with foreign nations. But the court held, opinion by Chief Justice Taney, [1] that the tax was nothing more than the exercise of the power which every State and sovereignty possesses of regulating the manner and terms on which property, real or personal, within its dominion, may be inherited. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. It was held also that the constitutionality of inheritance laws imposing taxation upon the State's own citizens is unquestioned, and it cannot be contended that aliens are entitled to any exemption. Indeed the court could see no objection to such a tax, even if imposed upon aliens exclusively. It had no concern with commerce or with exports. In answer to the argument that it was a tax on exports because it would be necessary to send abroad the inheritance, the court said that, if that argument was sound, no property would be liable to be taxed in a State when the owner intended to convert it into money and send it abroad.

§ 137. **License Tax on Foreign-Exchange Broker Not Tax on Exports.**—A license tax of four hundred and fifty dollars, levied by the State of Louisiana on money and exchange brokers, was sustained in the case of a broker who claimed that it was invalid as to him, because he dealt in foreign exchange exclusively, and that the taxing of bills of exchange was taxing the necessary instruments of commerce. But the court held[2] that this was not a tax on the bills of exchange, which under the law every person was free to buy or sell, but the tax was imposed for engaging in the business of a money or exchange broker. If a tax on the business of an exchange broker were invalid, all taxes on banks which deal in bills of exchange would be invalid. No one can claim

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[1] Mager v. Grima, 8 How. 490, 12 L. Ed. 1168 (1850); affirming 12 Rob. (La.) 584.

[2] Nathan v. Louisiana, 8 How. 73, 12 L. Ed. 992 (1850). See Fairbank v. United States, 181 U. S. 283, 45 L. Ed. 862 (1901); holding a Federal tax on foreign bills of lading a tax on exports.

an exemption from a general tax on the ground that the product sold may be used in commerce. The court concluded, page 82:

"The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all property and objects in the State which are not properly denominated the means of the general government, and as laid down by this court, it may be exercised at the discretion of the State. . . . Whatever exists within its territorial limits in the form of property, real or personal, with the exception stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation and there is no Federal power under the Constitution which can impair this exercise of State sovereignty."

§ 138. **State Taxing Power in Relation to Imports and Exports.**—In the case last cited the court further defined the taxing power of the State in relation to the prohibition of duties on imports and exports as follows, l. c., p. 81:

"No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation."

This was quoted and applied by the Court of Appeals of Maryland,[1] where it held valid a license tax on all those engaged in packing or canning oysters for sale or transportation, and whose place of business was in the State. It was claimed that the words "for transportation" made the law objectionable as an interference with commerce. The court said that the words "for sale" and "for transportation" were used to exempt those who packed or canned oysters for their own purposes; and further that the fact that oyster packers might transport their oysters outside of the State did not prevent

[1] State v. Applegarth, 28 L. R. A. 812.

it from taxing them for the prosecution of their business within its jurisdiction.[1]

§ 139. **State Tax Upon Alien Passengers Is Void.** — It was held in the Passenger Cases,[2] that the statutes of New York and Pennsylvania imposing taxes upon alien passengers arriving in the ports of those States were void. There is no opinion of the court, as such, as to the grounds of the decision.[3] Prior to this, in State of New York v. Miln,[4] a statute of New York requiring the master of a vessel to render the mayor a verified description of the names, ages, etc., of passengers was declared a proper police regulation.

The invalidity of the State tax upon passengers was again affirmed in 1875,[5] the court saying that the rule, which prescribed the terms or conditions upon which a vessel could discharge its passengers coming from foreign ports, was a regulation of commerce with foreign nations, and that it was immaterial that the statute did not come into operation until after the passenger had landed.

Still later, in 1881, another statute of New York was declared void,[6] which imposed a tax on every alien passenger and held the vessel liable for the tax, and it was immaterial that the act declared its purpose to raise money for the execution of the inspection laws of the State. The court said it

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[1] It was held in the U. S. Circuit Court of California, *In re* Wong Yung Quy, 2 Fed. 624, that a corpse is not property; that the remains of human beings carried out of the State for burial in a foreign country are not exports within meaning of the Constitution, and that the permit fee of $10.00, under the statute of California, for removal of remains of deceased persons, was valid as a sanitary measure.

[2] 7 Howard, 283, *supra.*

[3] See statement of the case in Henderson v. Mayor, 92 U. S., p. 269, 23 L. Ed. 543 (1876).

[4] 11 Peters 103, *supra.* For an interesting view of the difference of opinion in the court at this time, see remarks of Justice Wayne, 7 How. 429 to 436, and Chief Justice Taney, pp. 487 to 490.

[5] Henderson v. Mayor of New York, 92 U. S. 259, *supra.*

[6] People v. Compagnie Gen. Trans-Atlantique, 107 U. S. 59, 27 L. Ed. 383 (1883).

was not valid as an inspection law, as that could only relate to property.[1]

§ 140. **State Inspection Laws and Interstate Commerce.**— The Constitution[2] excepts from the prohibition laid upon the States to levy duties on imports or exports what may be absolutely necessary for executing their inspection laws. The Supreme Court held that the tobacco inspection laws of Maryland were valid under this clause, and that the charges upon the tobacco for outage and storage were authorized by the Constitution.[3] Such charges were for services rendered and were therefore lawful. It was claimed that the act discriminated between different classes of exporters, in that it exempted from certain regulations those who packed tobacco for exportation in the county or neighborhood where it was grown. But the court held that such discriminations the State had the right to make. It did not, however, express any opinion as to the provisions of the Maryland law for the inspection of tobacco grown out of Maryland.

The inspection law of North Carolina was also sustained by the Supreme Court.[4] A charge of twenty-five cents per ton upon fertilizers, to pay the cost of inspection, was held to be reasonable and proper. The court said that, as it was competent for the State to pass laws of this character, the requirement of inspection and payment of the costs did not bring the act into collision with the power vested in Congress. The right to make inspection laws was not granted to Congress, but was reserved to the States, subject, however, to the paramount right of Congress to regulate foreign commerce and among the several States. If the charge should exceed what was necessary for executing the inspection laws, it would be an unauthorized interference with

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[1] In Head Money Cases, 112 U. S. 580, 28 L. Ed. 798 (1884); the court sustained an act of Congress imposing a duty of fifty cents on every alien passenger coming into the United States in steam or sailing vessels. See also Crandall v. Nevada, *supra*, Sec. 20.

[2] Art. 1, Sec. 10, Par. 2.

[3] Turner v. Maryland, 107 U. S. 38, 27 L. Ed. 370 (1883).

[4] Petapsco Guano Co. v. North Car. Board of Agriculture, 171 U. S. 345, 43 L. Ed. 191 (1898).

the free importation of goods and therefore void. But if the law is really an inspection law the charge fixed by the State must stand until Congress shall see fit to alter it in its paramount power over commerce. This right to make inspection laws applies to commerce between the States as well as to foreign commerce, although the words imports and exports in the same section relate only to foreign commerce. The scope of inspection laws is not confined to articles intended for exportation, but applies to importations and articles intended for domestic use.[1]

While it is conceded that the inspection necessarily involves expense, and the power to fix the fee to cover the expense is left primarily to the legislature, and the receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another, yet if it is shown that the fees are disproportionate to the services rendered, or that they included the costs of something beyond legitimate inspection to determine quality and condition, the tax must be declared void, because such cost, by necessary operation, obstructs the freedom of commerce among the States. This was illustrated in the decision of the Supreme Court holding void the statute of Maryland imposing a tax upon oysters coming into the State.[2]

Each case must, therefore, depend upon its own facts, and ordinarily, though it appears that the sum collected is beyond what is needed for inspection expenses, the courts will presume that the legislature will reduce the fees to a proper sum.[3]

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[1] Neilson v. Garza, 2 Woods, 287. As to when the court will take judicial notice that the amount charged is unreasonably large for an inspection charge, see American Fertilizing Co. v. Board of Agriculture of North Carolina, 43 Fed. 609.

[2] Foote v. Stanley, 232 U. S. 494, 58 L. Ed. 698, reversing 117 Md. 335 (1914).

[3] Red "C" Oil Manufacturing Co. v. Board of Agriculture, 222 U. S. 393, 56 L. Ed. 244 (1912), affirming 172 Fed. 695.

CHAPTER IV.

REGULATION OF COMMERCE—*Continued.*

§ 141. Era of discriminating state taxation.
142. Privileges and immunities of citizens.
143. Discrimination against non-residents an interference with commerce.
144. Discriminating taxation condemned in state courts.
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146. What constitutes discrimination?
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149. The Supreme Court in Robbins v. Shelby Copnty Taxing District.
150. Robbins v. Shelby County Taxing District, reaffirmed.
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153. The Supreme Court on Taxation of Commercial Brokers.
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159. Definition of peddler.
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161. Licensing under police power.
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163. Supreme Court not concluded by title of act as to the purpose of act.
164. When a license tax act void in part is void in toto.
165. The separate delivery of portrait frames not taxable.
166. Orders for purchases or sales on future delivery, not exempt from state taxation.

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Const. U. S., Art. IV., Sec. 2.

§ 141. **Era of Discriminating State Taxation.** — The enforcement of the national control over interstate commerce has been prolific of litigation, both in the State and Federal courts, arising out of the conflict between the national supremacy on the one hand, and the authority of the States to

impose business, occupation and so-called privilege taxes on the other. The clamor of local merchants for protection against competition from other States was potent with State legislatures, as it was in the days of the Confederation before the adoption of the Constitution, and the result was the enactment of discriminations in taxation favoring the citizens and the goods and products of the State as against the citizens and products of other States. During the long period when the Supreme Court gave no decided opinion as to the supremacy of the national power in interstate commerce, such discriminating statutes multiplied, until, in one form or another, they were on the statute books of nearly every State in the Union. Thus Justice Miller said in 1889:[1]

"Notwithstanding for nearly one hundred years we have had in the Federal Constitution the declaration that Congress shall have power to regulate commerce among the several States, there are at this hour upon the statute books of almost every State laws violating that provision; and there is no doubt that if that clause were removed tomorrow, this Union would fall to pieces, simply by reason of the struggles of each State to make the property owned in other States pay its expenses. It was this tendency of each State to support its government out of taxes levied upon the property of other States, or on the produce or merchandise which must go through one State to another, that more than any other one thing compelled the formation of the present Constitution."[2]

The declaration of the Supreme Court in the cases already referred to, that commerce between the States must be free from State control or interference, was announced at a time when changed economic conditions made intolerable the discriminating legislation of the States. The extension of railroad systems over

[1] Lectures on the Constitution, p. 81.

[2] Justice Miller quotes from Mr. Van Buren in a speech in the Senate in 1826: "There are few States in the Union upon whose acts the seal of condemnation has not from time to time been placed by the Supreme Court. The sovereign authorities of Vermont, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, Missouri, Kentucky and Ohio have in turn been rebuked and silenced by the overruling authority of this court."

the country, the promotion of facilities of intercourse and transportation, unknown at an earlier period, extended the market available to producers. Instead of the buyer seeking in his own locality the manufacturer or jobber, an army of commercial travelers covered the country, bringing the goods of the manufacturer and jobber to the door of the retailer or consumer. The methods of business were revolutionized.

§ 142. **Privileges and Immunities of Citizens.**—Where citizens of other States are concerned, not only is this discrimination in taxation in favor of citizens or residents of the State an interference with commerce, but at this point the comprehensive provision of the Constitution for the regulation of commerce is reinforced by the specific direction in the Constitution that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." This specific protection accorded to citizens of other States, however, while it is included in the comprehensive guaranty of national control over commerce, falls far short of affording the necessary remedy. The right to carry on interstate commerce, and to be free from discriminating restrictions therein, is not limited to citizens. All non-residents of the State, and foreign corporations, which are not citizens within the meaning of Article IV, Section 2, are entitled to the protection of the Constitution in so far as they are engaged in interstate commerce.

In the earlier cases, however, before the position of the Supreme Court in regard to the national control over commerce was distinctly declared, both provisions of the Constitution were invoked, and in some cases the judges of the Supreme Court themselves differed in the grounds of their opinion as to the invalidity of such legislation, some assigning as a reason the violation of the privileges and immunities of citizens of other States and others the interference with commerce.[1]

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[1] Crandall v. Nevada, 6 Wall. 35, *supra*, §20; Ward v. Maryland, 12 Wall. 419. Thus Justice Miller, who delivered the opinion of the court in Crandall v. Nevada, decided in 1867, in holding a State tax on passengers passing through the State invalid, placed his decision on the ground that the tax was inconsistent with the relations of the

Later decisions of the court, however, have declared all such discriminations void on the ground of interfering with commerce.

§ 143. **Discrimination Against Non-Residents An Interference With Commerce.**—This was decided in the case of Ward v. Maryland.[1] The statute required all traders resident in the State to take out licenses, varying from $12 to $150, according to the value of their stock, and required of non-residents an annual license of $300. The Supreme Court held that this was void as a violation of the privileges and immunities of citizens of other States. It declared that, if the States could impose discriminating taxes against citizens of other States, it would soon be found that the power conferred upon Congress to regulate interstate commerce was of no value, and that inequality of burden as well as the want of uniformity in commercial regulations was one of the grievances of citizens under the Confederation, which the new Constitution was adopted to remedy.[2] The rule, that any form of discrimination in taxation against non-residents is invalid has been enforced in many State cases.

In Walling v. Michigan,[3] this principle was applied to a statute of Michigan imposing a tax upon persons, who, not residing or having their principal place of business in the State, engaged there in the business of selling or soliciting the sale of liquors to be shipped into the State. The court held that such an act was necessarily a discrimination in favor of the products of the State, and was thus a regulation and restraint of commerce; and

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State to the Federal Government, see *supra*, and doubted whether it could be avoided under the commerce clause; Justice Clifford and Chief Justice Chase based their opinion distinctly upon its being void under the commerce clause. In his lectures, however, delivered in 1889, Justice Miller speaks of the case as illustrative of the national regulation of commerce. See Miller on Const., p. 453.

[1] 12 Wallace, 419, 20 L. Ed. 449 (1871), reversing Ward v. State, 31 Md. 279.

[2] Justice Bradley concurred in this case, on the ground that the act was violative of the national control over commerce, and that it would be violative, even if the same burden was put upon non-residents for selling goods as upon residents.

[3] 116 U. S. 446, 29 L. Ed. 691 (1886).

it was none the less a discrimination though the subsequent act imposed a greater tax upon all persons in the State engaged in manufacturing or selling liquors to be shipped outside of its confines. The subsequent act imposed a tax on domestic dealers but not on their drummers, while the tax on drummers and agents of non-residents remained, and this operated as a discrimination.

§ 144. Discriminating Taxation Condemned in State Courts. —The same principle, that there must be no discrimination in taxation in favor of residents, since the decision in Ward v. Maryland has been recognized and applied in numerous decisions of the State courts. Thus statutes demanding licenses from non-resident peddlers, while exempting from the same requirement manufacturers, farmers and mechanics residing in the State, have been held void.[1]

In Pennsylvania, a borough ordinance was void, which discriminated against non-residents, by prohibiting them from peddling or selling goods from house to house without license, and fixed the fee at so high a figure as to amount to a prohibition, while it excepted residents of the borough from its operation.[2]

A New Hampshire statute provided that the court could grant peddlers' licenses, on proper application, to residents. The court held that the restriction was invalid under the Federal guaranty of equal privileges, and granted a license to a non-resident notwithstanding the restriction in the statute.[3]

An act authorizing the city of Philadelphia to require a license, except from Pennsylvania farmers peddling the products of their farms in the city:[4] and a similar ordinance of the city of Buffalo relating to the sale of farm products, and excepting retail sales by residents of the State and owners or lessees

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[1] Commonwealth v. Myer, 92 Va. 809; Rogers v. Kent Circuit Judge 115 Mich. 441; see also Albertson v. Wallace, 81 N. C. 479; Sinclair v. State, 69 N. C. 47.

[2] Sayre Borough v. Phillips, 148 Pa. 482. See Radebaugh v. Village of Plain City, 28 Weekly Law Bul. 107; *Ex parte* Thornton, 12 Fed. 538.

[3] In re Bliss, 63 N. H. 135.

[4] Coe v. Simmons, 3 Pa. Dist. Ct. 792.

of lands within the State, and sales of products grown by the sellers on their own lands, were held discriminating and void.[1]

A license fee exacted from peddlers, except those dealing exclusively with merchants of the county, merchants residing and having a regular place of business therein and citizens of the county selling wares of their own growth and manufacture, was held void. [2]

§ 145. **Discrimination in Taxation in Favor of Products of State Unlawful.**—The leading authority on this subject is the decision of the Supreme Court in Welton v. Missouri,[3] decided in 1875, reversing the Supreme Court of Missouri and holding void a statute of that State which, from the requirements of a license from peddlers, excepted goods which were the growth, produce or manufacture of the State. The State court had held that this was valid as a police regulation. But the Supreme Court said that the statute infringed the power of Congress to regulate commerce, which includes the power to determine how far commerce shall be free and untrammeled. In this case the court announced distinctly the doctrine, that that portion of commerce with foreign nations and between the States, which consists in the transportation and exchange of commodities, is of national importance and admits and requires uniformity of regulation.

The Supreme Court said in its opinion that the very object of investing this power of regulating commerce in the general government was to insure uniformity against discriminating state legislation, and that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal government over the commodity has ceased and the power of the state has commenced, concluding:

"It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of dis-

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[1] City of Buffalo v. Reavey, 55 N. Y. S. 792; see also Fecheimer v. City of Louisville, 84 Ky. 306.

[2] Commonwealth v. Snyder, 182 Pa. St. 630.

[3] 91 U. S. 275, 23 L. Ed. 347, reversing Missouri v. Welton, 55 Mo. 288.

criminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore in our judgment unconstitutional and void."[1]

This principle has been frequently enforced. Thus a statute of Virginia discriminating against manufacturers of other States, by requiring a license from their agents and not from the agents of its own manufacturers, was held invalid.[2] The Court said:

"Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, of their having been manufactured without the State, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the article sold or in the form of licenses for the sale. If by reason of their foreign character a State

[1] The Supreme Court of Missouri, in a decision of an earlier date however, was among the first, if it was not the first, of the State courts to condemn discriminations of this character in taxation. Thus in State v. North, 27 Mo. 464, in an opinion by Judge Scott, notable from the fact that it was pronounced shortly before the outbreak of the Civil War, when sectional feeling ran high in Missouri, it was said, l. c. p. 482: "Nothing is to be gained by the exercise of the power of laying a discriminating tax. If it is lawful for one State to do it, it is equally so to the others. Laws will be passed in retaliation of those we may enact, and so we may be losers in the end. Situated as the State of Missouri is, she should be one of the last to enter on such a course of legislation. Without a seaboard, far in the interior, cut off from all outlet to foreign commerce, she would be one of the greatest sufferers in a contest of such a nature. If we have erred in applying to the law under consideration the principle that a tax discriminating between foreign and domestic articles cannot be imposed, we feel confident, nevertheless, that the principle is a correct one. No one can rise from reading the history of events out of which our present constitution had its existence, without a conviction that the power of laying a discriminating tax on the importations from other States and nations was never designed to be left with the several States. That is a power only to be exercised by a single body, and that body has been created with ample power for the protection of the interests of all the States." This case was cited by the Supreme Court in Ward v. Md., *supra*, § 143.

[2] Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565 (1881).

can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product.''[1]

§ 146. **What Constitutes Discrimination.** — Discrimination may consist not only in a different rate of taxation or license as between domestic goods and goods from other States, but also in the requirement of a license for selling those which are foreign made when none is required for selling domestic goods, as in the cases cited, or also a license may be granted only in the case of domestic goods or residents.[2] Freedom of commerce under the guaranty of the Constitution requires equality of right and the absence of all discrimination. Thus, in a Pennsylvania case[3] an ordinance requiring peddlers and canvassers to take out licenses was held invalid, notwithstanding a proviso that it should not apply to persons soliciting orders for goods manufactured outside the State. The court said there were many articles of interstate commerce, such as the products of the soil, besides manufactured goods. But a requirement of all persons, without discrimination, who desire to peddle a certain commodity, that they must make proof of good moral character before they can obtain a license, is a proper regulation, and not in violation of the interstate commerce clause.[4]

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[1] For decisions in State courts holding discriminations in peddlers' licenses against goods manufactured in other States to be void, following Welton v. Missouri, see Vines v. State, 67 Ala. 73; *Ex parte* Thomas, 71 Cal. 204; State v. Furbush, 72 Me. 493; State v. McGinnis, 37 Ark. 362; Sayre Borough v. Phillips, 148 Pa. 482; Georgia Pkg. Co. v. Macon, 60 Fed. 774; Ames v. People, 25 Colo. 508. But held in State v. Stevenson, 109 N. C. 730, that the exception of "farm products purchased from the producer" from the return required to be made by merchants and other dealers as the basis for a license tax is not a discrimination against the products of citizens of other States.

[2] See *In re* Bliss, 63 N. H. 135, *supra*, Sec. 144.

[3] Port Clinton Borough v. Shafer, 5 Pa. Dist. Ct. 583.

[4] Commonwealth v. Harmel, 166 Pa. 89. An illustrative discrimination was held invalid in Iowa, where a city ordinance required a license from peddlers, except where they resided, and the goods were manufactured, in Marshall County. Marshalltown v. Blum, 58 Iowa, 184.

A tax upon property within the State of Tennessee which is the product of the soil of other states, when the laws of Tennessee exempted like property, when produced from the soil of Tennessee, was held to be a discrimination directly interfering with interstate commerce.[1] In this case the collection of a tax upon logs cut from the soil of other states was enjoined, because logs from Tennessee were exempted from taxation, and the tax was therefore held to be directly discriminative against the property from other States, although the property was subject to taxation in Tennessee were it not for such discrimination.

§ 147. **Discrimination Must Relate to Interstate Commerce.**—Thus a city ordinance imposing a license tax upon beer not made in the city but brought there for sale was held by the Supreme Court not open to objection, so far as it operated upon the business of the plaintiff in error, either under the commerce clause or as a violation of the privileges and immunities of citizens, because it did not appear that plaintiff's beer was not manufactured in the State of Virginia and for aught that appeared in the case it might have been manufactured in other parts of that State. In order to raise a Federal question on either ground, it must be shown that the manufacturer is in another State or in a foreign country. The writ of error therefore was dismissed.[2]

§ 148. **Taxation of Commercial Travelers from Other States Unlawful.**—The decisions of the Supreme Court denying the right to discriminate against either persons or products of other States were in accord with the prevailing judicial opinion in the State courts. But very many of the States had enacted statutes requiring licenses from *commercial travelers,* sometimes on behalf of both the State and those of its municipalities, which such commercial travelers visited. It was held by the State courts that such statutes, when free from discrimination either against the person employing the drummers or the States wherein the goods

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[1] Darnell & Son Co. v. Memphis, 208 U. S. 113, 52 L. Ed. 413 (1908), reversing 116 Tenn. 424.

[2] Downham v. Alexandria (Va.), 10 Wall. 173, 19 L. Ed. 929 (1870).

sold by them were produced, not open to constitutional objection of interfering with interstate commerce. These statutes however were nullified and these decisions overruled by the decision of the Supreme Court in Robbins v. Shelby County Taxing District, decided in 1887,[1] which laid down the definite rule ever since consistently adhered to in the Court, that while the State can tax property from other States as part of the general property within its jurisdiction, whether in the original packages or not, it cannot tax the business of importing from other States; and, as the right to bring goods from other States includes the right to sell them and to solicit sales, therefore the State cannot tax either the right to sell or the right to solicit sales, whether in the form of a license charge or otherwise.

§ 149. **Supreme Court in Robbins v. Shelby County Taxing District.**—Robbins, a commercial traveler for a Cincinnati firm, for refusing to pay the license required from all drummers and all persons not having a licensed house of business in the taxing district, who should sell or offer to sell goods, wares or merchandise by sample, was found guilty of a misdemeanor, and the conviction was sustained by the State court.

The Supreme Court held that the State statute was invalid as an attempted regulation of commerce; that in the matter of interstate commerce the United States was but one country, and therefore, this commerce could be subject to but one system of regulation. A merchant could not sell his goods in other States without procuring orders, and in most cases the only practical way was by soliciting orders and in many cases by exhibiting samples. The court said that it was urged that there was no discrimination between domestic and foreign drummers, that is, those of Tennessee and those of other States, that all were taxed alike. The court said that did not meet the difficulty as interstate commerce could not be taxed at all. If it was necessary to regulate this business of selling goods by sample and employing drummers, Congress could undoubtedly make reasonable

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1 120 U. S. 489, 30 L. Ed. 694, reversing 13 Lea (Tenn.) 303.

regulations as the case demanded, but Congress alone could do so. It is obvious, said the Court:

"That such regulation should be based on a uniform system applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different States. The confusion into which the commerce of the country would be thrown by being subject to State legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation."[1]

§ 150. **Robbins v. Shelby Taxing District Reaffirmed.**—Subsequently, in a case from Texas also imposing a tax upon commercial travelers, the court was asked to reconsider the Robbins case. It had been contended by the Texas court, in its opinion, that the decision was contrary to sound principles of constitutional construction and in conflict with the cases formerly decided by the Supreme Court. But the latter tribunal adhered to its ruling, saying:[2]

"Even if it were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior decisions had the effect to overrule them, whether mentioned and commented on or

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[1] Chief Justice Waite and Justices Field and Gray dissented, saying that they could see no constitutional objection to such a tax; that there was no discrimination and citizens of other States were taxed the same as if they were citizens of Tennessee. The State court had decided that any person who should sell by sample should pay the tax, and to that they agreed, and that it would be time enough to consider whether a non-resident can be taxed for merely soliciting orders without having samples, when such a case arose. In a later case, Corson v. Maryland, 120 U. S. 502, 30 L. Ed. 699 (1887), reversing 57 Md. 251, these dissenting judges concurred in the decision on the ground that the statute required the non-resident merchant desiring to sell by sample to pay for his license a sum to be ascertained by the amount of his stock in trade in the State where he resided and where he had his principal place of business; that is, the charge was measured by his capacity to do business all over the United States and without reference to the amount of the business done in Maryland.

[2] Asher v. Texas, 128 U. S. 129, 32 L. Ed. 368 (1888); reversing 23 Texas Ap. 662.

not. And as to the constitutional principles involved, our views were quite fully and carefully, if not clearly and satisfactorily, expressed in the Robbins case."

§ 151. **Supreme Court in Brennan v. Titusville.**—The principle of the Robbins case was again applied in the case of the agent of a Chicago manufacturer, who traveled and solicited orders for picture frames, exhibiting samples. He was convicted under an ordinance of the city of Titusville, Pennsylvania, for violating the city ordinance requiring a license from all persons canvassing and soliciting orders for goods, wares and merchandise. The Supreme Court of Pennsylvania sustained the tax, but was reversed by the Supreme Court of the United States. The latter court said it was immaterial that the tax was only required for selling to persons other than manufacturers and licensed merchants, because, if the State could tax for the privilege of selling to one class, it could for selling to another or to all. In either case it was a restriction on the right to sell and on lawful commerce between the citizens of two States. The Court was not precluded by the opinion of the Supreme Court of Pennsylvania, that the ordinance was enacted in the exercise of the police power.[1]

In this case the court distinguished Ficklen v. Shelby County, *infra,* Sec. 152, saying, l. c. p. 308:

"We only refer thus at length to that case to show the distinction between it and this case, and to notice that in the opinion was reaffirmed the proposition that no State can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on."[2]

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[1] Brennan v. Titusville, 153 U. S. 289, 38 L. Ed. 719 (1894).

[2] The effect of the decision in Robbins v. Shelby Taxing District, was to nullify the laws requiring licenses from drummers in a number of States. The decision was followed in the following States and United States Circuit Courts: *Alabama*: State v. Agee, 83 Ala. 110; *Ex parte* Murray, 93 Ala. 78; *Arkansas*: *In re* Rozelle, 57 Fed. 155; *District of Columbia*: *In re* Hennick, 5 Mackey, 489; *Georgia*: Wrought Iron Range Co. v. Johnson, 84 Ga. 754, the Georgia Supreme Court

§ 152. **Taxation of Commercial Brokers.**—The taxing power of the State over persons and subjects within its jurisdiction is not limited, except where it involves necessarily and directly the taxation of interstate commerce, that is, taxation of sales or soliciting sales, on behalf of a non-resident principal.

Thus in another Tennessee case,[1] the tax was levied upon commission merchants, who were known as commercial agents and merchandise brokers. They had no capital in their business and so, in accordance with the State statutes, took out a license for one year authorizing them to do any and all kinds of commission business. The tax was imposed on the gross yearly commissions during the year for which they were thus licensed. It happened that during the year 1887 all the sales negotiated by one of the parties, and most of those made by the other, were for non-resident principals. But it seems that their business was not confined to transactions for non-residents. A renewal of their licenses having been applied for, the application was denied because they made no return of sales and no payment of percentage on their commissions received. Thereupon a bill was filed to restrain any interference with their current business. The court affirmed the judgment of the Supreme Court of Tennessee deny-

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saying: "After the State has yielded to the Federal army, it can very well afford to yield to the Federal judiciary;" *Illinois*: City of Bloomington v. Bourland, 137 Ill. 534; *Indiana*: Martin v. Rosedale, 130 Ind. 108; *Kansas*: Ft. Scott v. Pelton, 39 Kans. 764; *Louisiana*: Simmons Hardware Co. v. Maguire, Sheriff, 39 La. Ann. 848; *Michigan*: People v. Bunker, 87 N. W. Rep. 90; *Minnesota*: *In re* Kimmel, 41 Fed. 775; *Mississippi*: Overton v. Vicksburg, 70 Miss. 558; *Nevada*: *Ex parte* Rosenblatt, 19 Nev. 439; *North Carolina*: *Ex parte* Hough, 69 Fed. 330; also State v. Bracco, 103 N. C. 349; *Oklahoma*: Baxter v. Thomas, 4 Okla. 605; *Pennsylvania*: *In re* White, 43 Fed. 913; *In re* Nichols, 48 Fed. 164; *In re* Tyerman, 48 Fed. 167; *Texas*: *Ex parte* Stockton, 33 Fed. 95; Talbutt v. State, 39 Texas Crim. Rep. 64; *Virginia*: Adkins v. Richmond, 98 Va. 91, and 47 L. R. A. 583. In Texas the State court at first declined to follow the Robbins case, see *In re* Asher, 23 Tex. App. 662, reversed in 128 U. S. 129, *supra*, Sec. 150.

[1] Ficklen v. Shelby County Taxing District, 145 U. S. 1, 36 L. Ed. 601 (1892).

ing the injunction, saying that the tax was not on the goods, nor on the proceeds of the goods, nor was it a tax on non-resident merchants, and that if it affected interstate commerce in any way, it was incidentally and so remotely as not to be a regulation of such commerce.[1]

It seems that in this case the complainants held themselves out as prepared to transact business upon commission for whoever employed them, whether resident or non-resident, and their claim of exemption rested upon the single fact that during that year their principals were non-residents. The case was distinguished from the Robbins case on the ground that there the tax was not upon Robbins, but upon the non-residents who employed him, while here the tax was upon the merchandise brokers themselves in respect to the general commission business which they conducted.

A tax upon the resident managing agent of a non-resident meat packing house, although a greater part of the business may be interstate in its character, does not conflict with the commerce clause of the Constitution where the tax is construed by the highest state court to apply only to the business of selling to local customers from the stock of original packages shipped into the state without a previous sale or contract and kept and held for sale in the ordinary course of trade and this domestic business is not shown to be a mere incident to the interstate business.[2]

So also a tax imposed by North Carolina which, as construed by the state courts, applied to such local business of a foreign packing house on sales within the state of products already stored there on orders received after the products were

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[1] See also State v. Wagener, 77 Minn. 483, where a statute requiring commission merchants selling agricutural produce on commission to take out a license and give bond for benefit of consignors was sustained, the court saying that the statute was obviously not intended to raise revenue, but to protect consignors of wheat and perishable farm produce from frauds so frequently practiced upon them. It was therefore an ordinary police regulation. See *infra*, Sec. 161.

[2] Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663 (1904), affirming 117 Ga. 969.

thus stored was not invalid as an interference with interstate commerce.[1]

On the other hand a North Carolina tax upon all those engaged in the business of selling sewing machines in the State was an unconstitutional interference with interstate commerce so far as applied to the sale of a single machine shipped into the State by a non-resident manufacturing corporation upon the written order of a customer under an ordinary C. O. D. consignment.[2]

It will be noted that in Brennan v. Titusville,[3] above referred to, the court referred to this case and said that it was no departure from the rule so firmly established by the prior decisions, saying:

"At least, no departure was intended, though, as shown by the division in the court, and by the dissenting opinion of Mr. Justice Harlan, the case was near the boundary line of the State's power. In that case the plaintiffs were in a general commission business, not acting for any particular firm within or without the State."

§ 153. **The Supreme Court on Taxation of Commercial Brokers.**—In another case, also from Tennessee, the Supreme Court reversed the judgment of the Supreme Court of that State, and held that parties who do business only for non-residents, that is, whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers in the State as agents for non-residents, that is, whose business is exclusively confined for non-resident parties, firms or corporations, are not subject to a privilege tax for conducting such business.[4] The fact that a broker, as such, can transact a local business as well as a business for non-residents, does not determine the

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[1] Armour Packing Co. v. Lacey, 200 U. S. 226, 50 L. Ed. 451 (1905), affirming 134 N. C. 467.

See also American Steel & W. Co v. Speed, *supra.*

[2] Norfolk & Wes. R. Co. v. Simms, 191 U. S. 441, 48 L. Ed. 254 (1903), reversing 130 N. C. 556.

[3] Ficklin v. Shelby County, *supra.*

[4] Stockard v. Morgan, 185 U. S. 27, 46 L. Ed. 785 (1902).

matter, and, if he confines himself to interstate business, he can do so without becoming liable to the tax.[1] The court said at page 580:

"Although it is said in the opinion of the State court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated."

It therefore is established by this judgment of the court that commercial agents or brokers who transact business exclusively for non-residents, in soliciting purchases or sales, are not subject to a privilege or occupation tax for so doing.

§ 154. **The Form of Commercial Agency Immaterial.**—It is immaterial therefore whether the agency in conducting interstate commerce is that of a drummer soliciting sales, or of a commercial broker negotiating purchases. The essential fact is that it is interstate commerce, that is, the sale of property out of the State to a resident of the State, or of property in the State, or of property in the State to a non-resident. It is immaterial whether the agent is a commercial traveler, or has an office as a commercial broker. He may neither travel nor have an office, but have a room at his hotel, or at his lodgings, in which he exhibits his samples or negotiates purchases. In the case of brokerage, however, it seems that exemption from taxation may be claimed only when the business is *exclusively* for non-residents.[2]

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[1] Following and quoting from Stratford v. Montgomery, 110 Ala. 619.

[2] See cases *supra*, Sec. 152 *et seq.*, and Walton v. Augusta, 104 Ga. 757, 30 S. E. Rep. 964, where parties engaged in the commercial street-brokerage business were held not exempt from municipal tax.

Delivery is essential to a sale. The agent delivering goods sold by a drummer or commercial traveler is therefore also exempt from State taxation. Thus the salaried distributing agent for a publishing firm of another State is entitled to distribute the books sold through another salaried agent, and a license cannot be exacted without an unlawful interference with interstate commerce.[1] It is immaterial that the goods are to be sold on the installment plan. The right to sell implies the obligation and right to deliver.[2]

"Commerce among the several States" is a practical conception not drawn from the "witty diversities" of the law of sales, said the Supreme Court, in holding that interstate commerce was unlawfully burdened by the municipal ordinance exacting a license fee from a person employed by a foreign corporation to solicit, within the municipality, orders for groceries which the company filled by shipping goods to him for the delivery to and collection of the purchase price from the customer, who had the right to refuse the goods if not equal to the sample, such goods always being shipped in distinct packages, corresponding to the several orders, except in the case of brooms, which after being tagged and marked like the other articles, according to the number ordered, are thus tied together in bundles of about a dozen wrapped up conveniently for shipment.[3]

§ 155. **Only Interstate Commerce Agencies Exempt.**—To secure exemption from the taxing power of the State over persons and subjects within its jurisdiction, it must appear that the business for non-residents is interstate commerce.

While interstate commerce is more than travel, and in its broad sense includes intercourse and the means of intercourse, it has been held not to include personal interstate contracts, like insurance, but to be limited to subjects of trade and barter

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[1] Huntington v. Mahan, 142 Ind. 695.

[2] *In re* Spain, 47 Fed. 208. See also Laurens v. Elmore, 55 S. C. 477, 33 S. E. Rep. 560; Pegues v. Ray (La.), 23 So. Rep. 904.

[3] Rearick v. Pennsylvania, 203 U. S. 507, 51 L. Ed. 295 (1906), reversing 26 Pa. Sup. Ct. 384.

offered in the market and having an existence and value independent of the parties to the contract.[1]

Thus neither the contract of fire insurance,[2] nor of marine insurance,[3] nor of mutual life insurance[4] constitute commerce. The making of such contracts, it was said, is a mere incident of commercial intercourse, and not commerce itself.

This distinction was illustrated in two cases from Tennessee. The soliciting of pictures to be enlarged outside of the State was held to constitute interstate commerce,[5] because the process of enlarging involved the making of a larger picture from the image of a smaller one, and hence there was traffic or commerce. But the business of collecting soiled linen in Tennessee for shipment to a Kentucky laundry to be washed and then returned was not interstate commerce.[6] The court said, in the latter case, that there was no commodity created of which the ownership was changed. It was simply a personal contract having no element of a commercial transaction.

On the other hand, the selling of cloth by sample to be made up in another State from measurements taken by the salesman, and the clothing returned to the purchaser, is a transaction of interstate commerce.[7]

§ 156. **The Sale of Goods in the State Subject to the Taxing Power of the State.**—The principle of exemption has no application when the goods sold by the commercial traveler or other solicitor are actually in the State when sold, as such a sale is not a transaction in interstate commerce. Accordingly when a salesman takes the goods about with him and delivers them when sold, a license may be required from him. See taxation

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[1] Paul v. Virginia, 8 Wall. 183, 19 L. Ed. 357 (1869).

[2] Paul v. Virginia, *supra.*

[3] Hooper v. California, 155 U. S. 648, 39 L. Ed. 297 (1895).

[4] N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. Ed. 1116 (1900), affirming 148 Mo. 583.

[5] Tennessee v. Scott, 98 Tenn. 254, and 36 L. R. A. 461.

[6] Smith v. Jackson, 54 S. W. Rep. 981, and 47 L. R. A. 416.

[7] State v. Rakin, 76 N. W. Rep. 299, 11 So. Dak. 144.

of peddlers, *infra*, Sec. 158.[1] Thus where a corporation of one State sends its manufactured goods into another in car load lots, and causes the goods to be stored in a storehouse, from which its agents take them in small quantities, carry them about the country, and sell and deliver them to purchasers, such agents are not engaged in interstate commerce. In other words, when the goods are sent into the State unsold and are there stored for sale, they became part of the general property of the State and amenable to its laws.[3] Thus, in the case last cited it was said by the court, Caldwell, J., that while the State could not license the selling by sample of goods which were not in the State, it could tax the privilege of selling them after they had been shipped into its jurisdiction and stored in a storehouse, in this case a railroad depot rented for the purpose. The property then can be taxed as other property in the State. It is immaterial that the goods in the State are in the original packages, provided of course they are not imported foreign goods.[4]

It is immaterial that the goods sent into the State on orders forwarded by the drummer are packed in a box and consigned to him for distribution therefrom. The opening of the box in such case does not cause the property to become mingled with the property of the State for taxation.[5]

Whether such goods thus sent into the State and there stored for the purposes of sale are taxable or not, of course depends upon the laws of the State. It has power to tax them, because they are within its jurisdiction, and it also has power to tax

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[1] South Bend v. Martin, 142 Ind. 31; State v. French, 109 N. C. 722.

[2] American Harrow Co. v. Shaffer, 68 Fed. 750.

[3] Hynes v. Briggs, 41 Fed 468; Singer Mfg. Co. v. Wright, 97 Ga. 114, 35 L. R. A. 497.

[4] *In re* May, 82 Fed. 422, 432, and see cases cited *supra*, Sec. 119 *et seq.* See also *In re* Nichols, 48 Fed. 164, where the ordinance imposing a license was held void in the case of a book agent, although the books sold by him were delivered from a stock in a branch office of storeroom in Pittsburgh, replenished from time to time by the publisher. The point here involved, as to the effect of this renting of a storeroom, was not discussed in the opinion.

[5] *In re* Spain, 47 Fed. 208.

the business of selling them. It has been held, however, that such sending of goods into a State by a foreign corporation does not constitute "doing business" within the State. See *infra*, Sec. 188.[1]

A party sells goods as owner, not as agent, and is accordingly subject to a license tax, where, after obtaining orders therefor from resident customers for a non-resident concern, he submits these orders, and, having obtained the goods, which are charged to him individually and shipped directly to him in bulk, he delivers the goods to the several customers and collects the price.[2] The distinction is between the sales made by a party as agent for a non-resident principal and sales made by a party for himself on his own account.

§ 157. **Discrimination Must be More than an Incidental Disadvantage.** — To constitute discrimination in taxation against a non-resident manufacturer or dealer, there must be more than a mere incidental disadvantage, not growing out of any intention on the part of the legislature to make a hostile distinction. The act must show an intention to discriminate. Thus, in a recent case,[3] a tax levied by the State of Ohio upon every person, corporation or partnership carrying on the business of trafficking in spirituous, vinous or intoxicating liquors was adjudged valid, and the bill filed by a brewing company of West Virginia to enjoin a county treasurer from enforcing a collection of this tax levied on beer shipped to the company's Ohio agent and stored for delivery in its cold storage house, was held properly dismissed. There was no illegal discrimination in the

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[1] The distinction between the taxing power of the State over property within its jurisdiction and the actual exercise of that power is illustrated in People *ex rel.* Mills v. Commissioners of Taxes of New York, 23 N. Y. 242, where it was held that manufactured goods, owned by non-residents and sent into New York for mere purposes of sale without reinvestment of the proceeds, were not taxable under the provisions of the New York statute.

[2] Kimmell v. State, 104 Tenn. 184; see also Croy v. Obion County, 104 Tenn. 525.

[3] Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. Ed. 269 (1900), affirming 92 Fed. 28.

exemption of liquors sold upon prescriptions issued in good faith by physicians, or exclusively for chemical, pharmaceutical or sacramental purposes; nor in the fact that the sale of liquor at the manufactory by the manufacturer in quantities of one gallon or more at one time, was not subject to the tax. The plaintiff claimed that the latter provision operated as an illegal discrimination against him, because he must necessarily sell at places other than his manufactory. The court, however, replied, that manufacturers both within and without the State could sell at the manufactory and ship to any part of Ohio, and the incidental disadvantage that the foreign manufacturer was under, if he wished to establish in Ohio a place for making sales, did not appear to arise out of any intention on the part of the legislature to make a hostile discrimination against foreign manufacturers. The tax in this case was not an interference with interstate commerce, but a legitimate exercise of the police power of the State under the Wilson Act.[1]

A revenue act requiring all merchants to pay as a license fee a certain per cent on the total amount purchased in or out of the State, except purchases of farm products from the producer, for cash or on credit, was not a tax on the privilege of purchasing the goods, but on the goods themselves as part of the general mass of property in the State, and such a tax did not therefore in its application to purchases outside of the State operate as an interference with interstate commerce.[2] Nor did the fact that merchants would probably buy more products from resident than non-resident farmers constitute such interference.

§ 158. **A Tax Upon Peddlers Without Discrimination Against Residents or Products of Other States is Valid.**—The taxation of peddlers without discrimination in favor of either the residents or the products of the State, is valid. This was the ruling of the State courts before the Supreme Court decided the question.[3] Thus, in the case cited, decided in 1853, it

[1] See *supra*, Sec. 135.

[2] *Ex parte* Brown, 48 Fed. (N. C.) 435.

[3] See Commonwealth v. Ober (Mass.), 12 Cush. 493.

was said by Chief Justice Shaw in answer to the objection that the statute licensing peddlers was an interference with commerce: "We consider this as wholly an internal commerce which the States have a right to regulate, and in this respect this law stands on the same footing with the laws regulating sales of wine and spirits, sales at auction, and very many others, which are in force and constantly acted upon."

The question first came before the Supreme Court in the case of a sewing machine agent in Tennessee, who was held properly convicted for the failure to have a peddler's license, the court saying that the requiring of a license from each peddler without reference to the place of growth or manufacture of his wares, was neither a violation of the constitution nor an attempted regulation of commerce.[1] This ruling was reaffirmed in a later case, where the Missouri statute condemned by the court in the Welton case, which had been re-enacted without the discriminating clause, was construed and approved.[2] The opinion says, at page 311:

"The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

"The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Mis-

[1] Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754 (1880).

[2] Emert v. Missouri, 156 U. S. 296, 39 L. Ed. 430 (1895), affirming 103 Mo. 241. Among State decisions to the same effect are: Wrought Iron Range Co. v. Carver, 118 N. C. 328; City of Carrollton v. Bazzette, 159 Ill. 284; Cole v. Randolph, 31 La. Ann. 535; State v. Harrington, 68 Vt. 622; State v. Richards, 32 W. Va. 348.

souri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce. Its object, in requiring peddlers to take out and pay for licenses and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect their citizens of the State against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door."

It was argued in this case on behalf of the company owning the sewing machines which the peddler was selling, that it had forwarded its machines from its works in another State as "a matter of interstate commerce" to its agent, to be sold by him on its account, and that the exaction of a license from Emert was in effect a regulation of commerce; but the court held that peddling was not interstate commerce

§ 159. **Definition of a Peddler.**—The court in this case adopts the definition of a peddler given by Justice Shaw in Commonwealth v. Ober, *supra,* Sec. 158, as follows:

"The leading primary idea of a hawker and peddler is that of an itinerant traveling trader, who carries goods about, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this (though perhaps not essential), by a hawker is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish."

The peddler is therefore an itinerant trader, one who sells and delivers wares, usually small, from house to house. It is not necessary that he should be personally interested in the sales. He may be paid for his services by salary or otherwise.

It is held in the District of Columbia that an agent may be compelled to take out a peddler's license who sells goods at retail from house to house and delivers them at the time

of the sale, as an advertisement for a wholesaler who employs him.[1]

In a Virginia case it was said that a peddler is a person who does not keep a regular place of business, either in a house, vacant lot or elsewhere, open at all times in regular business hours, and who offers wares for sale.

§ 160. **Peddlers and Drummers.**—As a State or municipal license may be required of a peddler, but not of a drummer, the question has been raised in several cases as to when a party is the one or the other.[2] Thus it was held in the United States

[1] *In re* Wilson (D. C.), 12 L. R. A. 625.

[2] Thus, in North Carolina, State v. Gorham, 115 N. C. 721, an itinerant who sold and put up lightning rods was held properly required to take out a license. There was no violation of interstate commerce, as there was a distinction between the business of selling lightning rods and putting them up, and the State had the right to license the latter, though no extra charge was made therefor.

In State v. Caldwell, 127 N. C. 521, the agent of a non-resident portrait company, having made contracts of sale by samples, placed the pictures in the frames in his room at the hotel, and then delivered them to the purchasers. The court decided that this was not interstate commerce, distinguishing the case from Brennan v. Titusville on the ground that no title to the pictures passed until they were put into the frames and delivered. Judge Clark dissented, holding that there was no breaking of bulk in the legal sense and that the transaction was in effect a delivery of the article sold by sample.

In Georgia, Racine Iron Co. v. McCommons, 111 Ga. 536, the court held that an itinerant selling smoothing irons was none the less a peddler because he took his orders first by sample and then, after the lapse of some period of time, whether a day, week or month, freighted himself with the goods and filled the orders, which he had previously procured by a house-to-house canvass.

Contra: In Wyoming, State v. Willingham, 9 Wyo. 290, an itinerant picture agent who not only sold by sample but received and distributed the pictures and frames, was held to be engaged in interstate commerce.

In Indiana, a book agent distributing books previously sold by sample, was held to be engaged in interstate commerce. Huntington v. Mahan, 142 Ind. 695.

In Texas, where orders for groceries and medicine were taken by sample and brand, forwarded to a non-resident firm and filled on approval, and the goods were shipped back in boxes consigned to the firm

Circuit Court in Missouri,[1] that a single sale by a drummer who was selling by samples, effected by his delivery of the article that he carried with him as a sample, did not make him a peddler within the meaning of the Statute of Missouri requiring a license of peddlers. The court said:

"To hold that such sporadic, casual sale fixes upon the party the office of a dealer does not obtain outside of the practice under the revenue laws, which are designedly rigid and controlled by the letter of the act."

But a party is none the less a peddler within the meaning of the statute exacting a license from itinerant traveling traders, when he goes from house to house and sells and delivers goods which he carries with him, although he may occasionally sell by sample and forward the order to his non-resident principal. In other words, it is immaterial that he occasionally transact business in interstate commerce, if he is at the same time a peddler within the meaning of the State statute. Thus, in a case under the same Missouri law, the party went from house to house carrying a single harrow with him, which he sometimes sold and delivered, and then replaced by another from the warehouse where the harrows were stored, but which in other cases he used as a sample and thereafter filled the order. The Supreme Court of the State held that this agent was a peddler. In this case, however, the harrows were stored in the State, so that the transaction in any event was not one of interstate commerce. [2]

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in Texas, where they were unpacked and delivered to the purchasers from the car, it was held that this was interstate commerce. Turner v. State, 41 Tex. Crim. Rep. 545. See also Miller v. Goodman, 40 S. W. Rep. 718.

[1] *In re* Houston, 47 Fed. 539.

[2] State v. Snoddy, 128 Mo. 523; State v. Wessell, 109 N. C. 735; American Harrow Co. v. Shaffer, 68 Fed. 750. See also French v. The State, 52 L. R. A. 160, where the court held that the agent of a non-resident organ company carrying an organ in a wagon which he sometimes delivered and sometimes used as a sample, sending an order for one to be shipped to the purchaser, was engaged in interstate commerce.

Some of the State courts and United States Circuit Courts, particularly before the decision of the Supreme Court in Emert v. Missouri, in sustaining the right to tax peddlers, held that the original packages shipped from other States were still the subjects of interstate commerce until sold, although stored in a warehouse in the State.[1] But, as already shown, see Sec. 125, *supra,* the original package in interstate commerce, when stored in the State unsold, is protected against its police power, but not against its taxing power. One State cannot exclude the original package coming from another without the consent of Congress; but when stored within its jurisdiction for the account of the non-resident owner, it is subject to taxation like other property of the State; see authorities *supra,* Sec. 121. The State therefore has the power to tax, not only the property, but also the occupation of selling it. The test of its taxing power is the presence of the property sold within its jurisdiction at the time of the sale.

§ 161. **Licensing Under the Police Power.**—The State can license occupations as well for police regulation, in the interest of public health and morals, as for purposes of revenue. The licensing of itinerant traders has been sustained on both grounds. Thus the Supreme Court said in Emert v. Missouri, *supra,* Sec. 158, that the object of the statute in that case under consideration was to protect the citizens against the cheats and frauds, or even thefts, which the experience of ages had shown were likely to attend itinerant and irresponsible peddling from place to place and from door to door.

A statute then, obviously intended, not to raise revenue, but to protect the public, will be sustained, although incidentally it may affect interstate commerce. See note, Sec. 152, *supra.*

Thus, in an Iowa case,[2] a license on itinerant vendors of drugs was held valid, although defendant sold in the original

[1] See French v. The State, *supra;* Commonwealth v. Harmel, 166 Pa. 89.

[2] Iowa v. Wheelock, 95 Iowa, 577; State v. Smithson, 106 Mo. 149. See also Commonwealth v. Newhall, 164 Mass. 338.

packages, the court saying that the primary object of the act was not to derive revenue for the State, but in large part at least to protect its citizens against solicitations and harmful practices of irresponsible and unknown vendors of drugs, and that the prohibited act could be committed without any sale.

Licenses required of liquor dealers are therefore within the legitimate police power of the State. But even such licenses must not discriminate against the citizens or products of other States,[1] nor can there be any interference, without the consent of Congress, with the shipment of original packages into the State. But the requirement of license, though the issue of it depends upon the permission of a majority of a board and the approval of adjacent property owners, provided there be no discrimination, is not in violation of the Federal Constitution.[2]

§ 162. **Police Power Cannot Interfere With Interstate Commerce.**—The police power of the State, therefore, whatever may be the subject, must be exercised subject to the national control over commerce. It cannot interfere with this, under the guise of restraining peddling from door to door by irresponsible parties. Thus it was strongly urged in the case of Brennan v. Titusville, *supra,* Sec. 151, in the words of the Supreme Court of the State, that if canvassers, hawkers and peddlers coming from other States and infesting the homes of the citizens at all seasons and imposing their worthless goods upon gullible or inexperienced housemaids or housewives, should, under the guise of interstate commerce, be permitted without any restraint whatever to go on deceiving and injuring the public, it would be a startling and unlooked for result of the investment of the general government with the power to regulate commerce. But the

[1] Tiernan v. Rinker, 102 U. S. 123, 26 L. Ed. 103 (1880); Walling v. Michigan, 116 U. S. 446, 29 L. Ed. 691 (1884); reversing People v. Walling, 53 Mich. 264; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258; see also Pabst Brewing Co. v. Terre Haute, 98 Fed. 330; State v. Zophy, 84 N. W. R. 391, 14 S. Dak. 119; Cullman v. Arndt, 125 Ala. 581, State v. Lichtenstein, 44 W. Va. 99.

[2] *In re* Christensen, 85 Cal. 208; Hinson v. Lott, 8 Wall. 148, 19 L. Ed. 387 (1869).

Federal Supreme Court answered, page 298, that the license did not purport to be exacted in the exercise of the police, but rather in the taxing power, and that it was not designed to protect from imposition or wrong either minors, habitual drunkards, or persons under any other affliction or disability. There was no charge that the goods which defendant was engaged in selling, i. e., pictures and picture frames, were open to any condemnation, and they were in fact unchallenged subjects of commerce. "There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community." The court therefore held that the act was not a legitimate exercise of the police power, but was a direct interference with interstate commerce.[1]

§ 163. Supreme Court Not Concluded by Title of Act to Purpose of Act.—In determining whether a license is exacted in the legitimate exercise of the police power of the State, the Supreme Court is not concluded, as to the purpose of the act, by either the recital of the purpose or the title. Thus, in Bren-

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[1] In Arnold v. Yanders, 56 Ohio 417, 47 N. E. Rep. 50, the act of Ohio, making it unlawful to sell or expose for sale within the State *convict made goods* without first obtaining a license of $500 per annum, was held void as interfering with commerce.

The Texas statute imposing an occupation tax of $500 upon every person, firm or association engaged in selling the "Sunday Sun," the "Kansas City Sunday Sun," or other publications of like character, being applicable to all persons, whether residents of the State or not, engaged in selling "publications of like character" with those specifically mentioned, was held not a discrimination against either the person or the property of the owners of the publications named, but a legitimate exercise of the police power, and therefore not invalid as a regulation of interstate commerce. Preston v. Finley (C. C.) 72 Fed. 850.

See also similar statute sustained in 17 Tex. App. 253.

See also Phillips v. Mobile, 208 U. S. 472, 52 L. Ed. 578 (1908), Municipal license tax imposed upon those selling beer by the barrel, half barrel or quarter, held, as applied to interstate transactions in the original packages as an exercise of the police power, permitted by the license act of 1890, as lawfully enacted in the exercise of the police powers, though revenue may be derived from the ordinance.

nan v. Titusville, *supra,* Sec. 151, while the court found that the ordinance was declared in the title to be for general revenue purposes, it said that even if that declaration had been reversed and the license had been declared in terms to have been enacted as a police regulation, that would not decide this question, for whatever may be the reason given to justify, or the power invoked to sustain, the act of the State, if that act is one which trenches directly upon that which is exclusively within the jurisdiction of the national government, it cannot be sustained. The Supreme Court, however, in this as in other cases, adopts the construction given by the State court to the statute, and then determines whether the statute as thus construed and enforced by the State court is an interference with interstate or foreign commerce. See *supra,* Sec. 65.

§ 164. **When a License Tax Act Void in Part is Void in Toto.**—When a discriminating feature of a statute, or a provision laying a tax upon sales by non-residents and thus interfering with commerce, is held void, whether other provisions of the statute, providing for the taxation of residents and parties not engaged in interstate commerce, are void likewise is a matter of construction of the State statute, upon which the judgment of the State court is conclusive, so that no Federal question is raised. The decision obviously depends upon whether it can be assumed that the legislature would have enacted the statute without the discrimination.[1] Thus in the Income Tax Cases the Supreme Court held that the tax upon incomes constituted an entire scheme of taxation, which Congress would not have enacted except as an entirety; and the invalidity of certain provisions was therefore held to invalidate the law.[2]

For the purpose of avoiding judicial annullment of the entire act, clauses are sometimes inserted in revenue enactments providing that the sections of the act shall be deemed severable and that the invalidity of one section shall not affect the other provisions of the act. Obviously the effect to be given to such

[1] See State v. O'Connor, 5 N. Dak. 629.

[2] *Infra,* Sec. 560.

legislative declaration must depend upon the facts of the specific case, and it must still be a judicial question as to how far sections are severable, that is, how far the invalidity of one section of an act affects the remainder of the act.[1]

§ 165. **The Separate Delivery of Portrait Frames Not Taxable.**—A dealer in New York sent soliciting agents to Virginia, who took their orders on blanks furnished by the company for portraits, giving the purchasers tickets entitling them to appropriate frames to be thereafter shipped, the court held[2] that this purchase of the frames was not a separate transaction but a part of the interstate transaction between the non-resident manufacturer and the customer, and from the point of view of commerce the business was one affair. The court again said this illustrated that commerce among the States was a practical one and not a technical conception. The conviction for peddling without a license was therefore reversed.

To the same effect was the ruling in a North Carolina case[3] where the delivery of pictures and frames was effected through two agents instead of one, and that this made it none the less interstate commerce. The court said that the negotiations of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

§ 166. **Orders for Purchases or Sales on Future Deliveries Not Exempt from State Taxation.**—There is no interference with interstate commerce in a tax on transfers of corporate stock under the New York statute as applied to the sales for future delivery of corporate stock between two non-residents. The court said that the immediate object of the sale was the certificate of a stock then present in New York and this was the constituent of title.[4]

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[1] See recent U. S. Revenue Acts in Appendix.

[2] Davis v. Virginia, 236 U. S. 697, 59 L. Ed. 795, reversing 113 Va. 562 (1915).

[3] Caldwell v. North Carolina, 187 U. S. 622, 47 L. Ed. 336 (1903).

[4] New York *ex rel.* Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415 (1907), affirming 184 N. Y. 431.

The license tax of Mobile, Alabama, upon the business of buying and selling cotton on future delivery was not interstate commerce.[1] The court said that the business of taking orders on commission for the purchase and sale of grain and cotton for future delivery, and transmitting these orders to other States was not interstate commerce so as to be exempt from State taxation. Where these contracts resulted in actual delivery, the property was bought in the State to which the orders were transmitted and there held for the purchaser, and in those cases where there was a delivery upon a contract or sale made by the broker, the seller was at liberty to acquire the property in the market where the delivery was required or elsewhere.

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[1] Ware v. Mobile County, 209 U. S. 405, 52 L. Ed. 855 (1908), affirming 146 Ala. 163.

CHAPTER V.

FOREIGN CORPORATIONS IN INTERSTATE COMMERCE.

§ 167. Rights of foreign corporations in interstate commerce.
168. Foreign corporation "does business" in State only through comity of State.
169. Right to impose discriminating taxation as condition of admission into State.
170. Foreign insurance companies.
171. Same principle extended to foreign insurance associations.
172. Foreign corporations not admitted into State under United States treaty.
173. State has power to change conditions of admission of foreign corporations.
174. Retaliatory legislation in condition for admission.
175. Pembina Mining Company v. Pennsylvania.
176. Horn Silver Mining Company v. New York.
177. Right to discriminate against foreign corporations.
178. Discrimination limited to imposition of conditions for admission.
179. Distinction however academic rather than practical.
180. Impairment of obligation of a contract in exclusion of foreign corporation.
181. Discontinuance of business by foreign life insurance company.
182. Admission of foreign company held to involve a contract right.
183. Holding United States bonds by foreign corporation does not exempt it from taxation on corporate franchises.
184. Nor is foreign corporation engaged in importing business exempt from tax on corporate franchises.
185. Tax upon capital employed within State.
186. Discrimination in favor of State manufacturers in foreign corporation tax.
187. "Doing business" in State.
188. What is not "doing business" in State.
189. Ownership of property in State does not of itself constitute "doing business" in State.
190. Holding stock in domestic company by foreign company is not "doing business" by latter in State.
191. Supreme Court of Pennsylvania on what constitutes "doing business."
192. What is "doing business" in State.

193. "Doing business" by holding interest in limited partnership.
194. Must have business domicile in State.
195. Corporations engaged in Federal business or interstate commerce.
196. Corporations engaged in "Carrying on Interstate Commerce."
197. The revocation of the right to do business not applicable to interstate carriers.
198. Payment of tax under threat of forfeiture of right to do business not voluntary.
199. Corporate franchise taxes in relation to interstate commerce.
200. Corporations carrying on interstate commerce not exempt from charges for privilege of incorporation.

§ 167. **Rights of Foreign Corporations in Interstate Commerce.** — In the protection of interstate commerce against discriminating or interfering State taxation, there is no distinction between non-resident individuals and corporations. Corporations, it is true, are not citizens within the meaning of Article IV., Sec. 2 of the Constitution, providing that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, though they are persons, as will be seen, within the meaning of the Fourteenth Amendment, and therefore entitled to due process of law and the equal protection of the laws. The right to engage in interstate commerce, however, does not depend upon citizenship, and the capacity of the foreign corporation to do so must be determined by its own charter as granted by the State of its creation, and by the law of the State in which it is carrying on business. A manufacturing company therefore, incorporated and doing business under the laws of one State, can send its commercial travelers soliciting sales through other States, and may ship its goods to the purchasers or to its agents for delivery to purchasers. In like manner, foreign corporations may employ commercial agents in different States, and such agents will be entitled to the same protection in transacting interstate commerce as if they were employed by non-resident individuals. These principles are so well established that it is unnecessary to cite authorities in their support.[1]

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[1] Coit v. Sutton, 102 Mich. 324, 25 L. R. A. 819, and cases cited in opinion.

§ 168. **Foreign Corporation Does Business in State Only Through Comity of State.** — It is equally well established that the foreign corporation, unless actually employed in the service of the Federal government or in furnishing the facilities of interstate commerce, *e. g.*, an interstate carrier, cannot come into a State and "do business" therein without the consent of the State.[1] While the foreign corporation may sell its goods in the State, or solicit sales in the transaction of interstate commerce, as a right, it can only establish itself in the State and do business therein, as a privilege granted by the State. While the State cannot tax the exercise of the right, it can tax the enjoyment of the privilege. As the State has the right to exclude foreign corporations, it necessarily has, involved therein, the right to impose conditions on their admission into its jurisdiction.[2]

§ 169. **Right to Impose Discriminating Taxation as Condition of Admission Into State.**—As the State has the right to determine the conditions of admission of foreign corporations into the State to do business therein, it has the right to make the grant of this privilege conditional upon the payment of a license tax and to fix the sum in its discretion. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of the corporate powers in the State. The situation is analogous to the grant of a corporate charter by the State, which confers the right to act in a corporate capacity upon such terms, as it deems proper. In like manner, the grant to a foreign corporation of the right to act in a corporate capacity within the State is made upon such terms as the State deems proper to impose.

The taxation of shares of a foreign corporation owned by inhabitants in the State, while shares in domestic corporations are only taxable when the property of the corporation is not exempt

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[1] Bank of Augusta v. Earle, 13 Peters 519, 10 L. Ed. 274 (1839); Lafayette Ind. Co. v. French, 18 How. 451, 452, 15 L. Ed. 451 (1856).

[2] Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. Ed. 657 (1900); affirming 19 Tex. Civ. Ap. 1.

and not taxable to the corporation itself, is not inconsistent with substantial equality and does not violate the commerce clause of the Constitution.[1]

§ 170. **Foreign Insurance Companies.**—This principle was illustrated in a case from Illinois, where the Supreme Court held valid a license tax exacted from foreign insurance companies of two dollars upon every one hundred dollars of premium collected in Illinois.[2] This sum was charged as the amount of the license to be paid as a condition of doing business in the State. The court quoted one of its former decisions[3] to the effect that a foreign insurance company has no right to do business in the State without the State's consent, and that the business of insurance is not interstate commerce, and concluded: "as to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

§ 171. **Same Principle Extended to Foreign Insurance Associations.**—The same ruling was extended by the court to an English association organized under what was known as a "deed of settlement," legalized and enlarged by the acts of Parliament, which had many of the attributes generally found in corporations for pecuniary profit. It had a distinctive name and, under the statute, could sue and be sued in the name of one of its officers, though it had no common seal. The State of Massachusetts enacted a statute imposing a tax of four per cent upon all premiums collected by a foreign insurance company, two per cent upon those of companies incorporated under the laws of another State of the United States, only one per cent upon those of a Massachusetts company, and no tax at all where the business of insurance was transacted by natural persons, citizens of Massachusetts. It was argued that this association

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[1] Darnell v. Indiana, 226 U. S. 390, 57 L. Ed. 267 (1912), affirming 174 Ind. 143.

[2] Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972 (1871).

[3] Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (1869).

was not a corporation, but a body of natural persons. But the court held, affirming the Supreme Court of Massachusetts,[1] that, as the law of corporations is understood in this country, the association was a corporation, and that the court could pay no attention to the local policy of England in determining whether an association was an incorporated body. The court therefore said that the company could not exercise its functions in the State of Massachusetts without the payment of this specific tax as a condition, and that the imposition of such a tax, discriminating as it was, was no violation of the Federal Constitution or of any treaty protected by it.

§ 172. **Foreign Corporations Not Admitted Into State Under United States Treaty.**—As the right of the State to determine who shall act in a corporate capacity within its limits is an attribute of its sovereignty, subject only to the control of the Constitution of the United States, it follows that a corporation organized in a foreign country, having its principal place of business there, can derive no right to do business in the State through treaty stipulations between the United States and that country. Thus it was held that a corporation organized in England was not a subject of that country within the meaning of the treaty giving its subjects the right to do business in any State of the Union on the same terms as natives.[2]

§ 173. **State Has Power to Change Conditions of Admission of Foreign Corporations.**—As the State has power to exclude entirely, it has power also to change the conditions of admission of foreign corporations at any time for the future, and to impose as a condition the payment of a new tax or the pay-

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[1] Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029 (1871). Justice Bradley concurred in the result, but thought the company was a special partnership or joint-stock company, which came nevertheless within the scope of the Massachusetts statute. See also Southern B. & L. Assn. v. Norman, 98 Ky. 294.

[2] Scottish Union Ins. Co. v. Herriott, 109 Iowa 606. See also Liverpool Ins. Co. v. Massachusetts, *supra*, Sec. 171.

ment of a further tax as a license fee. When it requires such license fee as a prerequisite, for the future, the foreign corporation, until it pays it, is not admitted within the State. "It is outside, at the threshold, seeking admission, with consent not yet given." It is immaterial what is the occasion of the change. This was the decision of the Supreme Court[1] in a case from New York, where a change in the amount of the annual license was complained of, which effected a discrimination as between corporations coming from one State and those of the same class coming from others.

This power of the State to exact a further tax does not mean that the State can deny any contract rights secured to the corporation by its admission, see *infra*, Sec. 182; nor can it place a tax upon the corporation's rights beyond the jurisdiction of the State,[2] nor a tax which is an interference with or a burden upon interstate commerce.[3]

§ 174. **Retaliatory Legislation in Condition for Admission.** —In the case of the Philadelphia State Association, the change in the conditions of admission was effected through what is known as retaliatory legislation, that is, the statute provided that, whenever the laws of any State should require from a New York insurance company a greater license fee than the laws of New York should then require of all insurance companies of such other State, all such companies of such other State should pay in New York a license fee equal to that imposed by such other State on New York companies. This act was contested in the State court on the ground that it was an unlawful delegation of legislative power. But the court held that the act of

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[1] Philadelphia Fire Association v. New York, 119 U. S. l. c. 110, p. 119, 30 L. Ed. 342 (1886). Justice Harlan dissented, saying that Pennsylvania corporations could not be subjected to higher taxes in N. Y. than are imposed there upon corporations of the same class from other States; that this was a violation of the equality required by the Fourteenth Amendment. See *infra*, "Equal Protection of the Laws," Ch. XV.

[2] See Green Company v. Looney, 218 Fed. 260, N. Dist. of Texas (1914), three judges sitting.

[3] See *infra*, Sec. 196.

legislation was complete, and that it was competent to make the increase take effect in a given contingency.[1] Such provisions exist in the statutes of many of the States, and have been almost uniformly sustained.[2]

In the Kansas case cited it was said in the opinion by Judge Brewer, afterwards Justice Brewer of the Supreme Court, that such a provision is more properly to be deemed one for reciprocity than for retaliation, and that it is no violation of the provision of the State constitution for equality in taxation, as the classification of foreign corporations by States is a reasonable and proper one.

The Supreme Court in Philadelphia Fire Assn. v. New York, *supra,* Sec. 173, only discussed the Federal question, as the case was brought before it on writ of error to the highest court of the State, and the decision was put upon the single ground that the change in the conditions of admission was within the power of the State. It was said in the State court, on the claim that the conditions violated the Fourteenth Amendment, that "until they (the foreign corporations) are within our jurisdiction, the final clause of article 14, by its own terms, does not apply. While they stand at the door bargaining for the right to come in they may decline to come, but cannot question our conditions if they do."[3]

§ 175. **Pembina Mining Company v. Pennsylvania.**[4]—The power of the State was forcibly illustrated in the case of the Pembina Mining Company v. Pennsylvania, where plaintiff was a Colorado company having its principal office in its home State, but having another in Philadelphia for the use of its officers. Pennsylvania assessed against the corporation for an office license a tax which amounted to $250, one-quarter of a mill on each dollar of its million dollars of capital stock. The Supreme

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[1] People v. Fire Association, 92 N. Y. 311; see also *infra,* Sec. 187.

[2] Phoenix Ins. Co. v. Welch, 29 Kansas 672; Home Ins. Co. v. Swigert, 104 Ill. 653; State *ex rel.* v. Insurance Co., 115 Ind. 257. But see *contra,* Clark v. Mobile, 67 Ala. 217.

[3] 92 N. Y. p. 327.

[4] 125 U. S. 181, 31 L. Ed. 650 (1888).

Court, affirming the Supreme Court of Pennsylvania, held that the tax was valid, and said at page 186:

"The recognition of its (the corporation's) existence in Pennsylvania, even to the limited extent of allowing it to have an office with its limits for the use of its officers, stockholders, agents and employees, was a matter dependent on the will of the State. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State."

§ 176. **Horn Silver Mining Company v. New York.**—A New York statute provided that every corporation, domestic and foreign, should be subject to a tax upon its corporate franchises or business, to be computed by a certain percentage of its capital stock, measured by the dividend on the par value of that stock, or where there were no dividends, or its dividends were less than a certain percentage upon the par value of the capital stock, then according to a certain percentage upon the actual value of the capital stock. A Utah corporation had a capital stock of ten million dollars and the tax assessed thereon was thirty thousand dollars, which however it refused to pay, claiming that the tax was illegal. The evidence showed that it paid taxes both in Utah and in the State of Illinois, and that the greater part of the capital used in its business, was out of the State of New York. But the Supreme Court sustained the tax,[1] saying, l. c., p. 313:

"The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross

[1] Horn Silver Mining Co. v. New York, 143 U. S. 305, 36 L. Ed. 164 (1892), affirming 105 N. Y. 76.

receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business by its permission within the State. As to a foreign corporation—and all corporations in States other than the State of their creation are deemed to be foreign corporations—it can claim a right to do business in another State to any extent, only subject to the conditions imposed by its laws."

§ 177. **Right to Discriminate Against Foreign Corporations.**—It is not essential that the State should impose the same tax, as a condition for a foreign corporation to act in a corporate capacity in the State, that it charges its own citizens for organizing under its own laws and acting in a corporate capacity. In the sense that it has the right to determine what shall be paid in each case for the privilege of acting in a corporate capacity, it has the right to discriminate. Therefore the State can make the admission of a foreign corporation dependent upon the payment of a specific license tax, or of a sum proportionate to the amount of its capital, and it is not necessary that this tax should be specifically entitled a license. Thus, in the case last cited, the court said at page 315:

"The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. However, it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized."

§ 178. **Discrimination Limited to Imposition of Conditions for Admission.**—It was said in the same opinion, that neither

an individual member of a foreign corporation, nor the corporation itself can call in question the validity of any exaction which the State may require for the grant of its privileges. This obviously refers to the tax imposed for the privilege of acting in a corporate capacity in the State. It does not mean that, after the corporation has been admitted into the State and paid the charge exacted for admission, it is not entitled to due process of law, or the equal benefit of the laws under the Federal Constitution, or equality and uniformity of taxation under the State government. The situation is therefore analogous to that of a domestic corporation. The State may impose such exaction as it pleases as a condition for granting the corporate franchise, but when the corporation is organized, its property is to be taxed as other property, subject to such classification and specification as may lawfully be made.

§ 179. **Distinction However Academic Rather Than Practical.**—So far as the taxing power of the State is concerned with reference to foreign corporations admitted through its consent, the limitation of the power to discriminate in taxation to the imposing of conditions for admission is academic rather than practical, for the reason that the State may require the submission by the foreign corporation to discriminating taxation as a condition of its continuing in force or renewing the license of the corporation to do business within its confines.[1] It is true the State cannot require foreign corporations to submit to an unconstitutional requirement as a condition of admission. Thus a stipulation in the license to do business that the foreign corporation will not remove a case to the Federal court is void, and will not prevent the removal of a case,[2] nor can the company's agent continuing to do business be punished for violation of a statute containing such a requirement.[3] But on the other hand, the Federal court will not enjoin the enforcement of the revocation of a license to do business, though made according

[1] See Philadelphia Fire Association v. New York, *supra.*

[2] Insurance Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365 (1874).

[3] See Barron v. Burnside, 121 U. S. 186, 30 L. Ed. 915 (1887).

to the terms of a statute directing such revocation when the company removes a case to the Federal court.[1] In this latter case the court said that the State had the power to exclude the foreign corporation, and that its intention or reason in excluding it could not be inquired into.[2]

§ 180. **Impairment of Obligation of a Contract in Exclusion of Foreign Corporation.**—A contract, under which a foreign corporation is to have the management of a factory within the State, calls for the transaction of business within the State, within the meaning of a statute forbidding foreign corporations to transact business until they have filed a copy of their charter with the Secretary of State. The obligation of such a contract is not impaired by a statute making such contracts wholly void on the corporation's behalf, but the contract is enforcible against the corporation, although such statute was by its terms not to go into effect until after the contract was entered into.[3]

§ 181. **Discontinuance of Business by Foreign Life Insurance Company.**—Where a foreign life insurance company which had been doing business in the State by maintaining an office and complying with the State law regulating the admis-

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[1] See Doyle v. Insurance Co., 94 U. S. 535, 24 L. Ed. 148 (1877).

[2] Justices Bradley, Swayne and Miller dissented, saying that though the State may have the power, if it sees fit, to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their transacting business. . . . "Any agreement, stipulation or State law precluding them from this right is absolutely void." They said further that the argument that the greater always includes the less, and that therefore if a State may exclude without any cause, it may exclude for a bad cause, is unsound. The practical difficulty with this reasoning is that the State may decline to renew the periodical license without assigning any reason. In Waters Pierce Oil Co. v. Texas, *supra*, it was held that a foreign corporation was bound by the conditions of the permit, whatever its limitations and discriminations.

[3] Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 47 L. Ed. 328 (1903), affirming 103 Fed. 838.

sion of a foreign insurance company, has discontinued its office, and has no office or agents in the State, the mere continuance of the obligation of its existing policies, together with the receipt of the renewal premium of these policies at the company's home office, does not constitute in itself the doing of a local business in the State, and, therefore, the privilege tax upon the amount of premiums paid was unlawfully exacted[1] after such discontinuance of its office in the State.

§ 182. **Admission of Foreign Company for a Definite Term May Involve a Contract Right for that Term.**—While a State has the power to exclude foreign corporations and to fix the terms of their admission, if the statute provides that foreign corporations shall do business during the lifetime of domestic corporations without being subject to other and greater liabilities than are imposed upon domestic corporations, a contract right is thereby acquired by a foreign corporation, which is impaired by a subsequent act imposing upon foreign corporations a corporate tax or license fee based on entire capital stock in double the amount imposed on domestic corporations.

This was illustrated in a Colorado case where the court held that a contract right thus acquired by a foreign corporation was unlawfully impaired by such a discrimination between domestic and foreign corporations.[2] The court said:

"The power to impose different liabilities was with the State at the outset. It could make that greater or less than in case of a domestic corporation, or it could make that the same. Having the general power to do as it pleased, when it enacted that the foreign corporation, upon coming into the State, should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities. . . . It was not a mere license to come in the State and do business therein upon payment of the sum named, liable to be revoked or the sum in-

[1] Providence Savings Life Assurance Society v. Ky., 239 U. S. 103 (1915), 60 L. Ed. 167, reversing 155 Ky. 197; 160 Ky. 16.

[2] American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 51 L. Ed. 93 (1907), reversing 34 Colo. 240, Chief Justice Fuller and Justices Holmes, Harlan and Moody dissenting.

creased at the pleasure of the State, without further limitation. It was a clear contract that the liability, etc., should be the same as the domestic corporation and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic corporation at the same time and to the same extent."

As domestic corporations had in the State a corporate life of twenty years, the court held that this was the term of the contract.

§ 183. **Holding United States Bonds by Foreign Corporation Does Not Exempt it from Taxation on Corporate Franchises.**—Where the tax is upon the privilege of acting or doing business in a corporate capacity, it is immaterial that a portion of the capital stock of the corporation is invested in securities of the United States. As before seen, see Sec. 16, *supra,* it is otherwise where the tax is upon the capital stock or property of the company. It therefore follows that where a foreign corporation is admitted to do business in the State, a tax imposed upon its corporate franchise or right to do business, and graduated according to the dividends of the company, is not invalidated by the fact that a portion of the dividends may be derived from interest on capital invested in United States bonds.[1]

The lawful substitution, by a foreign insurance company, of United States bonds in place of municipal bonds deposited by it with the Superintendent of Insurance for the protection of local policy holders, as a condition for doing business in the State, when made before the day on which the company is required to list its property for taxation for a certain year, prevents the levying of any tax thereon for that year; but such exemption of the bonds from taxation did not prevent their distraint to satisfy taxes lawfully levied on unexempted personal property of the owner of such bonds.[2]

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[1] Home Ins. Co. v. New York, 134 U. S. 594, 33 L. Ed. 1025 (1890).

[2] Scottish Union & National Ins. Co. v. Boland, 196 U. S. 611, 49 L. Ed. 619 (1905).

§ 184. **Nor is Foreign Corporation Engaged in Importing Business Exempt from Tax on Corporate Franchises.** — The same principle has been extended to the case where a foreign corporation is engaged in importing foreign goods and selling the same in the original packages. Thus in a New York case where the tax was imposed, as a tax upon the franchise, upon the amount of the capital stock employed within the State, and a part of the business of a Michigan corporation doing business in New York consisted in the importation of crude drugs and their sale in original packages, it was contended that such part of their business, under the doctrine of Brown v. Maryland, could not be taxed by the State. The court however replied:[1]

"But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

§ 185. **Tax Upon Capital Employed Within State.**—Some State have required, as a condition of the admission of a foreign corporation, the payment of such part of the incorporating tax, fixed by the laws of the State, as represents the portion of the capital of the foreign corporation employed within the State. Such a tax as to corporations doing business in the State only through its consent is clearly within the power of the State to impose. In other States the foreign corporation, in consideration of the privilege of doing business in the State, is required to pay an *annual* tax upon that portion of its entire capital employed within the State. Such capital "employed within the State" would in any event be subject to the taxing power of the State as property or business within its jurisdiction, and the validity of such a tax does not depend upon the

[1] New York State v. Roberts, 171 U. S. 658, 43 L. Ed. 323 (1898), affirming 149 N. Y. 608.

consent of the State to the admission of the foreign corporation. The validity of such a method of taxing a foreign corporation is therefore clear.[1]

Under the rule laid down in the Horn Silver Mining Company case, *supra,* Sec. 176, the State could exact a tax discriminating against the foreign corporation, as a condition of admitting it, and in such event the only remedy would be an appeal to the State legislature to remedy the unjust discrimination. But where the tax is only upon the capital employed within the State, there is no discrimination to complain of.

What is the amount of the capital employed within the State is a question of fact, whereon the corporation, when allowed a hearing, is concluded by the action of the State tribunal; and errors in the determination of it would not present a Federal question for review.[2]

§ 186. **Discrimination in Favor of State Manufactures in Foreign Corporation Tax.**—The provision in a State law taxing foreign corporations upon the capital employed in the State, but exempting corporations or companies wholly engaged in manufacturing in the State, was held in New York State v. Roberts, *supra,* to involve no unlawful discrimination against the manufactured goods of other States. The court said, at page 665: "It is said that the operation of that portion of this taxing law which exempts from a business tax corporations which are wholly engaged in manufacturing within the State of New York, is to encourage manufacturing corporations which seek to do business in that State to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts."[3]

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[1] See New York State v. Roberts, *supra,* Sec. 171.

[2] New York State v. Roberts, *supra.*

[3] Justice Harlan, with whom Justice Brown concurred (Justice White not sitting), dissented, saying that such statutes would amount to a tariff protecting goods manufactured in that State against competition in the markets there with goods manufactured in other States. And

The reference in the last sentence quoted to the fact that the privilege was not restricted to New York corporations, seems to have been made to show that there was no unlawful discrimination against the manufactured products of other States, and thus no interference with interstate commerce.[1]

§ 187. **"Doing Business" in State.**—A State cannot tax the foreign corporation for the privilege of doing business in its jurisdiction unless it actually does business therein, and what constitutes doing business must therefore be determined. In a number of States statutes have been enacted, prescribing terms upon which foreign corporations shall be permitted to do business. These usually include the filing of a certificate in a public office, designating the principal place of business of the corporation in the State, and the resident agent on whom process may be served. Where such certificate is filed, the corporation is concluded by the admission thereby made that it is doing business in the State, and is accordingly liable for the taxation imposed upon it by way of license fee or otherwise as a condition of its admission.[2] Penalties are provided for the transaction of business in the State on behalf of such foreign corporation without the filing of a certificate, and questions have arisen as to what constitutes "doing business" with reference to these statutes. But it is not within the scope of this work to consider the effect of non-compliance with them upon the con-

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as to the fact that the exemption was not limited to New York corporations, said at p. 683: "This view falls short of meeting the difficulty presented, namely, that the statute by its necessary operation injuriously discriminates against goods manufactured in other States, in that such goods are not permitted to go into the markets of New York and compete there upon equal terms with like goods wholly manufactured in that State. This court has often said that the objection that a local statute was invalid as restraining or binding commerce among the States was not met by the suggestion that it operated equally upon citizens of the State which enacted it."

[1] Philadelphia Fire Association v. New York, *supra*, Sec. 173, *et seq.* A different system is now adopted in New York. See appendix Laws of New York, *infra.*

[2] People v. Philadelphia Fire Association, 92 N. Y. 311.

tracts of the corporation, or upon the rights of foreign corporations to bring suits in the courts to enforce such contracts made in the State.[1]

§ 188. **What is Not "Doing Business" in State.**—Irrespective of such statutes however, a corporation is only liable to State taxation, based upon its "doing business," if it in fact does business in the State, and what constitutes "doing business" under such circumstances is to be determined from what it actually does. It cannot consist in the corporation doing what it has the right to do without the consent of the State.

Thus a foreign corporation is not doing business in the State, when it ships its goods to its customers or sends its commercial agents through the State offering to sell or buy, in the course of interstate commerce.

Making a contract in the State was held by the Supreme Court not to constitute doing business therein, within the meaning of the statute requiring the filing of a certificate and the appointment of an agent.[2] The court said that as the statute contemplated one or more known places of business in the State, it could not apply to a case where a corporation had only done a single act and did not propose to do more.[3]

The doing business necessary to make a corporation amenable to the taxing power of a State must be distinguished from the doing business which may subject a corporation's agent to punishment for violation of the penal laws of the State, where

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[1] See Taylor on Corporations, 4th Ed., Sec. 401 and cases cited.

[2] Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. Ed. 1137 (1885). Justices Matthews and Blatchford basing their concurrence on the ground that the transaction itself was one in interstate commerce and not under control of the State.

[3] As to the distinction between making a contract and "carrying on business," see also Bamberger v. Schoolfield, 160 U. S. 149, 40 L. Ed. 374 (1895), Fifth Cir.; Wagner v. Meakin, 33 C. C. A. 577, 92 Fed. 76 (1899); Vaughan Machine Co. v. Lighthouse, 71 N. Y. S. 799; Empire Milling and Mining Co. v. Tombstone Co., 100 Fed. 910; Swann v. Mutual Reserve Fund Assn., 100 Fed. 922; Sullivan v. Sheehan, 89 Fed. 247.

he undertakes to act therein in behalf of a foreign corporation without the State's consent. A single act by such an agent might subject him to punishment, but could not, whether authorized by the corporation or not, constitute doing business within the State so as to subject the corporation to its taxing laws.

Where a non-resident corporation had one or more local agents in Mississippi to control the salesmen selling sewing machines throughout a limited number of counties, and reporting to such local agency, which in turn reported to a district agency in another State, the corporation during such period was doing business within the State and was taxable on credits, as provided by the statute of the State; but it was not so doing business in the State during a period when it had neither office, nor store, nor managing salesmen in the State, and did business only through traveling salesmen, and transmitted all cash collected and contracts arising from a disposition of merchandise to agencies outside the State.[1]

§ 189. **Ownership of Property in State Does Not of Itself Constitute "Doing Business" in State.** — Neither does the ownership within its jurisdiction of property, which becomes subject, as property, to the taxing laws of the State, constitute of itself doing business by the corporation therein.[2] Thus a foreign corporation may ship goods into the State to a commission merchant to be sold for its account, and cause them to be stored in a warehouse in the State so that they become subject as property to the taxing laws of the State, see *supra,* Sec 156, but that does not of itself locate the corporation in the State.

Thus it was held in Pennsylvania that the American Bell Telephone Company of Boston, a Massachusetts corporation, which leased its telephones to Pennsylvania corporations, to be by them operated under patents owned by the patent company according to license contracts, did not in consequence of the

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[1] Singer Sewing Machine Co. v. Adams, C. C. A., 5th Cir. (1909), 165 Fed. 877; Anderson v. Morris & E. R. Co., 216 Fed. 83, C. C. A., 2nd Cir. 1914.

[2] Missouri Coal & Mining Co. v. Ladd, 160 Mo. 435.

ownership and leasing of such property become subject to taxation as a foreign corporation doing business in Pennsylvania.[1] The court said the tax was not upon the telephone instruments as property, but upon the capital stock of the company. The property was in the State and subject to taxation, but the company was not.

In the same case also, it was held that the furnishing of means to the domestic company by the lessor company to transact business under the patents did not constitute a doing business in the State by the foreign company.

Though not a taxation case, the opinion of U. S. Circuit Judge Jackson, later Justice of the Supreme Court, in United States v. American Bell Tel. Co., involving the same company, is illustrative. It was claimed that the Massachusetts company was "carrying on business" in Ohio so "as to be subject to service of process" through its "managing agent" in that State, and that the agent of the domestic company was the "managing agent" of the defendant through the relation between the two corporations. The court said that none of the facts, which were the same as the facts in the Pennsylvania case above, constituting the relation between the parties was a "carrying on of business" in Ohio by the foreign company; and that the authorities do not define with exactness what amounts to "carrying on business," but none go to the extent of holding that such transactions as those then under consideration are sufficient. On the matter of owning property in the State, the court said at p. 44:

"But it will hardly do to say that the ownership of property in the State is the doing of business here within the meaning and intent of the law so as to make the owner personally present. It is undoubtedly true that, in respect to the particular property so owned and located within its limits, the State has the authority to proceed against it (*in rem*) for the purpose of taxation, or to subject it to the payment of valid claims and

[1] Commonwealth v. American Bell Telephone Co., 129 Pa. 217; see also People v. American Bell Telephone Co., 117 N. Y. 241; Commonwealth v. Standard Oil Co., 101 Pa. 119; United States v. American Bell Telephone Co., 29 Fed. 17 (Ohio).

demands against the foreign owner. It cannot, however, serve to bring the *person* of such owner within its jurisdiction, whether that person be a private individual or a patent-holding corporation."

§ 190. **Holding Stock in Domestic Company by Foreign Company is Not "Doing Business" by Latter in State.**—The argument was advanced in People v. American Bell Tel. Co.,[1] that the holding stock by the foreign corporation in the domestic company constituted a doing business by the former in the State. The court held that this was untenable, saying at p. 255:

"In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on and an influence in controlling its conduct; but they have created a legal entity to control such business, make its contracts and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business. The taxation of a foreign or domestic stockholder in a domestic corporation upon the business of such corporation, upon the theory that it was his business, would be an unreasonable exercise of the power of taxation."

§ 191. **Supreme Court of Pennsylvania on What Constitutes "Doing Business" in State.**—A very illustrative case as to what is and what is not a doing business in the State is the decision of the Supreme Court of Pennsylvania in the case of Commonwealth v. Standard Oil Company. The defendant was a corporation of Ohio, with authority to manufacture petroleum or its products. It had received no special authority from the State of Pennsylvania to transact business within its jurisdiction, but it bought crude petroleum in that State through brokers and shipped it to its refineries outside of the State. During the years 1872 to 1880 it owned interests in individual partnerships doing business in Pennsylvania as producers, refiners or transporters of oil. It owned some shares of stock in Pennsylvania corporations, and also had interests in limited partnerships in the same business in different parts of that State. During these years it

[1] 117 N. Y. 241.

had declared dividends upon its entire property in and out of the State exceeding the amount of its nominal capital stock. The court held[1] that, under the Pennsylvania statute requiring foreign corporations doing business in the State to pay a tax upon their capital stock, the ownership of the shares of stock in a Pennsylvania corporation and of interests in the limited partnerships and the purchases of oil through brokers did not constitute doing business in Pennsylvania so as to subject defendant to taxation under that statute.

§ 192. **What is "Doing Business" in State.**—On the other hand, it was held in the case last cited that the holding of *partnership interests* in Pennsylvania *partnerships* and directly sharing in the profits did constitute doing business within the State.

An illustrative case as to what constitutes doing business was decided in the United States Circuit Court in New York.[2] There a New Jersey corporation had its sales agency and office in New York City, but its plant and factory in another State. It was held to be "doing business" in New York, within the meaning of the statute of that State imposing a tax upon the corporate franchise of any foreign corporation doing business in the State. The court said, referring to the decisions of the New York Court of Appeals in the construction of the same statute:[3] "applying them to the present case, the occasional refining of oil in New York and the occasional storage of products in advance of sales there by complainant, without more, would not constitute doing business here. . . . But a foreign corporation which establishes a business domicile here and brings its property within the jurisdiction, and mingles it with the general mass of commercial capital, is taxable here." The statute meant, by "doing

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[1] Commonwealth v. The Standard Oil Co., 101 Pa. 119; also Shepp v. Traction Co., 17 Montgomery Law Rep. 52.

[2] Southern Cotton Oil Co. v. Wemple, 44 Fed. 24. In People *ex rel.* Southern Hotel Co. v. Wemple, 131 N. Y. 64, the New York Court of Appeals made the same ruling as to the same corporation, saying that the tax was not imposed upon the property, but upon the privilege of doing business in the State as a corporation.

[3] People v. Trust Co., 96 N. Y. 387; People v. Mining Co., 105 N. Y. 76.

business within the State," using the State as a business domicile for transacting any substantial part, even though a comparatively small part, of the business which the company was organized to carry on and in which its capital was embarked. The court concluded, p. 27:

"It would seem that a manufacturing company which maintains an established location here, and an agent, for the purpose of selling its products or facilitating their sale, carries on a part of its ordinary business here, and has a business domicile here; and if it keeps funds here for maintaining its place of business, and to enable it to carry on the operations of its agents, such a foreign company would seem to be taxable under the statute. Certainly it cannot matter that the volume of business done is small, or that the location, instead of being a warehouse or a shop, is an office or a sample room."[1]

In this case the corporation had done no business of any kind in the State of New York except keeping this sales agency and office, and the proceeds of sale were sent to the Philadelphia office, or deposited in bank subject to the draft of that office, excepting only a small bank account of some $2,500 kept in New York for office expenses. The court said that the case was not free from doubt, but their conclusion was that the tax was authorized by the statute.

A foreign pipe line company, laying pipes in a State, and having pumping stations, storage tanks, distributing apparatus and a branch business office in the State was held in New Jersey to be "doing business" in the State, and subject to a corporate franchise license for the privilege.[2]

§ 193. **"Doing Business" by Holding Interest in Limited Partnership.**—The Supreme Court of Pennsylvania, in the Standard Oil Company case, *supra*, Sec. 191, ruled that the ownership of shares in a limited partnership in that State did not constitute doing business by a foreign corporation under the statute of that State. It was held, however, by the New York Court of Appeals, construing the statute of New York, that the

[1] See also *infra*, Sec. 181.

[2] Tide Water Pipe Co. v. Assessors, 57 N. J. L. 516.

tax was properly imposed in that State upon a corporation organized in Germany, which had become a special partner with an investment of $150,000 in a limited partnership in New York, the latter being sole agent for the sale of its products in this country.[1] It was decided that the foreign corporation was taxable upon the amount of its contributed capital stock employed in the State of New York. The court declared that it considered the statute in the light of the public policy of the State and looked through the form at the substance. It said of the foreign corporation: "It has, in effect, by this method of a limited partnership established a place within this State for the doing of a part of its business, and though I come to the conclusion with some hesitation, I think that it may be regarded as coming within the operation of the statute."

§ 194. **Must Have Business Domicil in State.**—The foreign corporation therefore must establish a *business domicil* of some sort in the State before it can become subject as a corporation to the taxing laws of the State by reason of "carrying on business" therein. It may have property in the State which is taxable as property, but neither the ownership of such property, nor the relation of stockholder, patent licensor, nor creditor to a domestic corporation, constitutes "carrying on business" in the State unless it has a business domicil in the State, a sales agency, manufacturing plant, distribution warehouse or an interest in a domestic partnership. It must in some way establish a place within the State for doing some part of its corporate business.

§ 195. **Corporations Engaged in Federal Business or Interstate Commerce.**—While the States can thus levy even a discriminating tax upon foreign corporations engaged in doing business in the State, they cannot exclude corporations engaged directly in the business of the Federal government, nor can they impose any license charge or other tax in consideration of permitting such corporation to do business in the State. They may, however, tax property actually employed in such business equally with other property of the same class in the State. Thus the Su-

[1] People *ex rel.* v. Roberts, 152 N. Y. 59, O'Brien, J., dissenting.

preme Court said in Pembina Mining Co. v. Pennsylvania, *supra*, Sec. 175:

"And undoubtedly a corporation of one State, employed in the business of the general government, may do such business in other States without obtaining a license from them. Thus, to take an illustration from the opinion of Mr. Justice Bradley in a case recently decided by him, 'if Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union,' and, we may add, without the permission and against the prohibition of the State. Stockton v. Baltimore and New York Railroad Co., 32 Fed. 9, 14."

§ 196. **Corporations Engaged in "Carrying on Interstate Commerce."**—In one sense all commercial business between citizens of different States is interstate commerce. The manufacturer, who ships his goods to a purchaser in another State, is engaged in interstate commerce. But in this connection the term "carrying on interstate commerce" has a peculiar and technical meaning, which limits it to corporations actually engaged in carrying on interstate commerce, that is, common carriers and others, who afford the facilities whereby commerce is carried on between the States. Thus all public carriers, railroads, steamboats, telegraph or telephone companies, bridge and ferry companies, are carrying on interstate commerce in this sense, that is they are direct agencies of interstate commerce. The State can neither exclude corporations of this class actually engaged in carrying on interstate commerce, nor can it impose any conditions upon the transaction of their business in the State. A railroad or telegraph company opening an office in the State for its business and a manufacturing corporation, which establishes there a sales office or a sales agency, are both, broadly speaking, engaged in interstate business, but in a different sense. The latter can be taxed by the State for the privilege or excluded, the former cannot.

It has been shown[1] that insurance companies are not engaged in interstate commerce, and can therefore establish agencies in

[1] *Supra*, Sec. 155.

the State only by its consent, and subject to such conditions as the State may impose upon foreign corporations wishing to do business in its jurisdiction.

What therefore has been said as to the power to exclude foreign corporations and to impose discriminating taxation for the privilege of doing business in the State does not apply to interstate railroads and other corporations which are the direct agencies for the conduct of interstate commerce, but the property of such corporations in the State can be taxed as other property of the same class is taxed, and as will hereafter be shown, such property may be valued as part of the entire system of the company under the so-called mileage and apportionment rules.[1]

It is immaterial that such taxation upon the agencies of interstate commerce may be imposed in the form of a license to do business in the State provided it is in effect only a non-discriminating tax upon the property in the State and does not interfere with interstate commerce or tax the property which is out of the jurisdiction of the State.[2]

§ 197. **The Revocation of Right to do Business Not Applicable to Interstate Carriers.**—The license to do business in the State ordinarily provides for the revocation of the same, or a refusal to renew in case of a non-payment of the franchise or

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[1] Chs. VII and VIII.

[2] St. Louis & S. W. R. Co. v. Arkansas, *ex rel.* 235 U. S. 350, 59 L. Ed. 265 (1914), affirming 106 Ark. 321.

See also Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127 (1913), affirming 207 Mass. 381, 212 Mass. 35, where the court sustained the validity of a Massachusetts statute and its right to exclude for non-payment of an excise tax, and distinguished the case of Southern Railway Company v. Green, 216 U. S. 400, 54 L. Ed. 536, reversing 160 Ala. 396 (1910), where the court held invalid an additional franchise tax for the privilege of doing business within the State when no such tax was imposed upon domestic corporations carrying on a precisely similar business.

See also A. T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. Ed. 436 (1912).

See also Allen v. Pullman Palace Car Co., 191 U. S. 171, 48 L. Ed. 134 (1903), illustrating the distinction between the power of a State in regard to intrastate and interstate traffic.

other tax. Such a method of enforcing the payment of a tax could not be enforced against the interstate business of a railroad or other interstate carrier without interfering with interstate commerce, and is therefore invalid as to such business. Such a provision, however, in a statute will not invalidate the statute as it will be deemed separable therefrom, in the absence of an authoritative adjudication of the State courts that it is not separable, and in such case the statute would be adjudged invalid.[1]

The validity of a tax as a tax is therefore distinct from the validity of the means of enforcing the tax by revocation of the license. The tax may be held valid, even though this method of enforcement cannot be construed as applicable only to State business.[2]

§ 198. **Payment of Tax Under Threat of Forfeiture of Right to do Business Not Voluntary.**—Where, however, an unconstitutional tax is paid by an interstate carrier under such a threat of a revocation of its right to do business in the State, it is not a voluntary payment but is made under duress and therefore a suit may be brought to recover the same, even if the forfeiture of the right to do business could be confined by construction to business wholly within the State.[3] The court said that it was reasonable that anyone who denied the legality of a tax should have a clear and certain remedy, and a railroad therefore was not called upon to take the risk of having its contracts disputed and its business injured, and a payment made under such conditions was made under duress and was involuntary.

§ 199. **Corporate Franchise Taxes in Relation to Interstate Commerce.**—While a State cannot levy any tax on interstate commerce in any form, either by imposing such tax upon interstate business, or the privilege of engaging in such business or the receipts as such derived from it, the State can tax the privilege of being a corporation and the exercise of such privilege by a foreign or domestic corporation and within its limits.

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[1] St. Louis & S. W. R. Co. v. Arkansas, *supra.*

[2] A. T. & S. F. R. Co. v. O'Connor, *supra.*

[3] A. T. & S. F. R. Co. v. O'Connor, *supra.*

Such a tax is not made invalid because it is measured by the capital stock, which in the case of either a foreign or a domestic corporation may in part represent property which is not subject to the taxing power of the State. The State has the power to impose such a tax as supplemental to or in lieu of what is known as the general property tax. In the former case, however, the amount of the tax may become material in determining whether it constitutes a burden upon interstate commerce.

These principles were applied by the Supreme Court in sustaining the annual corporation franchise tax imposed by the State of Kansas graduated according to paid-up capital stock, but the maximum being limited to $2500.00. The court said that this tax was not a burden upon interstate commerce though imposed as supplemental to a general property tax in the case of an interstate railroad doing business in Kansas with a paid-up capital exceeding $3,000,000.00.[1]

The same principle was applied at the following term in sustaining a corporation franchise tax of Alabama based upon capital stock in a case of a consolidated corporation organized under concurrent acts of three States, which was also organized as a domestic corporation under the laws of Alabama. The court said that this case was controlled by the same principle as the Kansas case; that every such case must depend upon its own circumstances, and that while a State could not tax property beyond its borders, it might measure a tax within its authority by capital stock, which in part represented property without the taxing power of the State.[2]

The court said also this was not of the character condemned in the Western Union Telegraph Company case,[3] as there the tax was found, under the facts, to be in substance an attempt to tax the right to do interstate business and to tax property beyond the confines of the State. Such a tax was distinguished from a

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[1] K. C., S. F. & M. R. Co. v. Bodkin, 240 U. S. 27, 60 L. Ed. 617 (1916).

[2] K. C., Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S. —, 61 L. Ed. — (1916), affirming 192 Ala. 687.

[3] Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355 (1910),

franchise tax levied upon a corporation consolidated under the laws of that State by its own acceptance of that law by incorporating under it.

In the Western Union case the tax was applied only to foreign corporations doing business in the State, and the property of the corporation in the State was insignificant as compared with the aggregate of its capital stock, and, under the facts, the amount of the tax being considered, it was condemned as an illegal burden upon interstate commerce. In the later cases the amount of the tax was comparatively small, and it was imposed upon all corporations for the privilege of doing business in the State.

This recognition of the right of a State to impose a tax supplemental to a general property tax for the exercise of a corporate privilege in the State is, however, subject to the Federal protection against discrimination in the imposition of such an additional franchise tax upon foreign corporations, when no such tax is imposed upon domestic corporations carrying on a precisely similar business.[1]

In the later Alabama case[2] the court said that where the franchise tax was imposed equally upon all its corporations, consolidated and otherwise, the fact that an intrastate corporation may own no property outside of the corporation, while a consolidated corporation did, presented no class of arbitrary classification. The court said there was no denial of equal protection of the laws, because a State may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise, which the State grants in creating them. It follows therefore that such a franchise tax imposed for the exercise of

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[1] Southern Railway Co. v. Green, 216 U. S. 400, 54 L. Ed. 536 (1910). The court said it would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. Chief Justice White, Justice McKenna and Justice Holmes dissenting.

[2] K. C., Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S. —, 61. L. Ed. — (1916), affirming 192 Ala. 687.

the corporate privilege in the State should be imposed without discrimination and apply to domestic and foreign railroad corporations, domestic and foreign and public carriers of the same class.

This corporate franchise tax, as it is termed, which the State thus imposes on the privilege of doing business in the State, may be lawfully based upon the gross earnings within the State of an interstate corporation, and when reasonable in amount will be sustained, though it is supplemental to a general property tax. (See *infra,* Sec. 254.)

§ 200. **Corporations Carrying on Interstate Commerce Not Exempt from Charges for Privilege of Incorporation.** — But this exemption of corporations, *e. g.,* railroad companies and public carriers, engaged as instrumentalities of interstate commerce, from discriminating State taxation and conditions imposed upon the privilege of entering a State, does not include exemption from charges for the privilege of incorporating under the laws of a State. This was illustrated in an interesting case from Ohio. The Wabash Railroad, as reorganized after foreclosure, being a consolidation of companies existing under the laws of Ohio, Michigan, Indiana, Illinois and Missouri, wished to file its articles of consolidation under the laws of Ohio, as it had in other States. Its aggregate capitalization was fifty-two million dollars, and the State insisted on one-tenth of one per cent of the entire stock as the fee for incorporation under the Ohio law, making the sum of fifty-two thousand dollars. The company offered to pay seven hundred dollars, being one-tenth of one per cent on the capital stock, amounting to only seven hundred thousand dollars, of the only Ohio corporation which went into the consolidation. They claimed that this charge of fifty-two thousand dollars was an attempt on the part of Ohio to lay a burden on commerce and to give extra-territorial force to its taxing power. But the Supreme Court said[1] that it was for the State of Ohio to determine what conditions it would annex to the privilege of incorporation under its laws; that the purpose of tendering the articles to the Secre-

[1] Ashley v. Ryan, 153 U. S. 436, 38 L. Ed. 773 (1894).

tary of State was to secure to the consolidated company certain powers, immunities and privileges which appertained to a corporation under the laws of Ohio; that the State in granting corporate privileges to its own citizens, or what was equivalent thereto, permitting foreign corporations to become constituent elements of a consolidated corporation organized under its laws, could impose such conditions as it deemed proper; and that this incorporation fee involved no interference with interstate commerce or taxation of property beyond the limits of the State.

CHAPTER VI.

THE TAXATION OF STEAMBOATS AND VESSELS.

§ 201. Taxation of vessels as property.
202. Taxable *situs* of steamboats and vessels at home port.
203. *Situs* not affected by temporary enrollment as coaster elsewhere.
204. The taxable *situs* either the domicil of the owner or the actual *situs* of the vessel.
205. Steamboats on rivers and great lakes.
206. Home port when not conclusive as to *situs*.
207. State cannot tax privilege of navigating public waters.
208. Steam tugs cannot be taxed for privilege of navigating rivers.
209. The State may, however, tax the privilege of carrying on the towing business in a corporate capacity.
210. Police control by State over vessels in harbor or in transit.
211. Power of State to license oyster boats and fisheries.
212. State may exact tolls for using rivers and harbors improved at its own cost.
213. Taxation of ferries and bridges.
214. Gloucester Ferry Co. v. Pennsylvania.
215. Taxation of interstate bridges.
216. Taxation of interstate bridge not interference with interstate commerce.
217. Taxation of tonnage.
218. Property taxation and compensation for services distinguished from tonnage.
219. Supreme Court on tonnage duties and wharfage charges.
220. Wharfage charges may be graduated by tonnage.
221. But wharfage and similar charges must be without discrimination.
222. Quarantine and pilotage charges.
223. Taxation of land under harbors.

"No State shall, without the consent of Congress, lay any duty of tonnage."

Constitution of the United States, Art. 1, Sec. 10, Par. 3.

§ 201. **Taxation of Vessels as Property.**—The taxation of steamboats and other vessels navigating the public, that is the navigable waters of the United States—those which by themselves or in connection with other waters form a continuous channel for commerce between the States or with foreign nations

—has a direct relation to the regulation of such commerce, and the taxing power of the State is therefore limited not only by the specific prohibition in the Constitution against levying any tax upon tonnage, but also by the necessity of not interfering with the paramount control over commerce vested in Congress.

Steamboats and other vessels employed upon waters entirely within the jurisdiction of the State and having no water connection with other States or foreign countries, are taxable like other property within the jurisdiction of the State, and no Federal question is involved in such taxation. But when they are employed in interstate or foreign commerce, the taxing power of the State is limited, both as to the place and manner of taxation, so that they can only be taxed where they have a taxable *situs*. Any attempted taxation in other places is void as an interference with commerce, and while they can be taxed at their *situs* as property, no tax can be laid upon tonnage.

§ 202. **Taxable Situs of Steamboats and Vessels at Home Port.**—Steamboats and vessels navigating the public or navigable waters of the United States are taxable as property, irrespective of the residence of the owners, in the home port of the vessels, which is said to be their *situs* for taxation. Thus the steamers of the Pacific Mail Steamship Company owned by a New York corporation, registered at the custom house in New York, and employed in transporting passengers and freight between Panama and San Francisco, had no taxable *situs* in San Francisco.[1] The court said:

"Our merchant vessels are not unfrequently absent for years in the foreign carrying trade, seeking cargo, carrying and unlading it from port to port, during all the time absent; but they never lose their national character nor their home port, as inscribed upon their stern.

"The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State is familiar in the admiralty law. She is subjected in many cases to the ap-

[1] Hays v. Pacific Mail Steamship Co., 17 Howard 596, 15 L. Ed. 254 (1855); see also Transportation Co. v. Wheeling, 99 U. S. 273, 25 L. Ed. 412 (1879).

plication of a different set of principles. 7 Pet. 324; 4 Wheat. 438.

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation, they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

§ 203. **Situs Not Affected by Temporary Enrollment as Coaster Elsewhere.**—The fact that a vessel enrolled in one State at the port nearest where her owner usually resides is enrolled as a coaster at a port in another State, where she is employed as one of a daily line of steamers between that port and a port in a third State, does not cause her to become incorporated in the personal property of the State in which she is thus enrolled as a coaster. The fact, that the vessel was physically within the limits of the State at the time the tax was levied, did not decide the question any more than his physical presence would decide it, in case of a traveler passing through with his private carriage.[1]

The ferry boats operating between St. Louis and East St. Louis belonged to an Illinois corporation, and though enrolled in the city of St. Louis, when not in actual use, were laid up on the Illinois shore. They were held to have no taxable *situs* as property in St. Louis.[2] It was said in this case that the home port of the vessel under the United States Registry Laws, declaring the home port shall be that at or near which her owner resides, depends wholly upon the locality of the owner's residence, and not upon the place of the enrollment. The purpose in this case, said the court, was not to tax the property through the proprietor,

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[1] Morgan v. Parham, 16 Wallace 477, 21 L. Ed. 303 (1873).

[2] St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L. Ed. 192 (1870), on appeal from the U. S. Circuit Court. In another case the Supreme Court of Missouri had held the boats taxable in St. Louis, St. Louis v. Wiggins Ferry Co., 40 Mo. 580. As to the home port of a vessel under these decisions, see The Lotus No. 2, 26 Fed. 637. See also 2 Dillon's Municipal Corporations, 4th Ed., Sec. 786 *et seq.* and cases cited.

but to tax the property itself by reason of its being "within the city," and the boats were not "in the city" within the meaning of the statute.

§ 204. **The Taxable Situs Either the Domicil of the Owner or the Actual Situs of the Vessel.**—The settled rule that the domicil of the owner or the actual *situs* of the vessel, and not the place of enrollment of the vessel plying between ports of different States, engaged in the coastwise trade, and the consequent marking of the sterns of the vessels with the port of enrollment as provided for in U. S., R. S. 4178, 4334, was the criterion by which to determine the *situs* of the vessels for taxation was not changed by the declaration in the act of June 6, 1884, 23 Statutes at Large 58, that the word "port" as used in this section shall be construed to mean either the port where the vessel is enrolled or the place where it was built, or where one of the owners resides, which simply enables the owner to select a place other than the place of enrollment to mark upon the vessel.[1]

The inability of vessels by reason of draft of the depth of water to go to the *situs* of the domicil of the owner, does not prevent their taxation at that domicil where they have gained no actual *situs* elsewhere. It was therefore held that ocean-going steamships owned by a Kentucky corporation and plying between the ports of New York and New Orleans, and New York and Galveston and New Orleans and Havana, were taxable in Kentucky, the domicil of the owner, although the vessels are enrolled at the port of New York and carries the words "New York" on their sterns. These facts were not sufficient to give the vessel actual *situs* in New York.[2]

The owner does not have the arbitrary right, however, to select the place of taxation, although he does have the right to select the name of the place of enrollment and the place where the vessel is built, or the place where he resides, as the place to be marked on the stern as the home port.

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[1] Ager & Lord Tie Co. v. Kentucky, 202 U. S. 409, 50 L. Ed. 1086 (1906), reversing 26 Ky. L. Rep. 585.

[2] Southern Pacific v. Kentucky, 222 U. S. 63, 56 L. Ed. 96 (1911), affirming 134 Ky. 417.

§ 205. **Steamboats on Rivers and Great Lakes.**—Steamboats owned by a West Virginia company having its principal office in Wheeling, plying between different ports on the Ohio River, were properly taxable by the State of West Virginia in Wheeling on their value as personal property, under a statute authorizing that city to assess and collect an annual tax for the use of the State on personal property within its precincts.[1] It was said that the State could not tax ships as the instruments of commerce, but could tax the owners for their interest in them as personal property.

Thus steamers and vessels employed on the great lakes, having the name of their home port and the city of their owner's domicil painted thereon, as required by the United States Revised Statutes, Section 4178, have their *situs* for the purposes of taxation at their home port, and cannot be taxed as property of another State.[2] Where the place of enrollment is the same as the residence of the owner, that place is of course the home port and the *situs* for taxation. Under the provision of the Registry Laws referred to above, that port will, as a rule, be the place of State taxation, and it would seem that the same port, the place of enrollment, would be the *situs* for taxation, even if one or more of the part owners reside elsewhere.[3]

Vessels which, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a State, are subject to taxation in that State, although they may have been registered and enrolled under U. S. R. S., Secs. 4141, 4311, at a port outside the limits of the State.[4]

§ 206. **Home Port, When Not Conclusive as to Situs.**—It has been held in a recent case in a State court, though the question does not seem to have been definitely decided by the United States Supreme Court, that, while the place of enrollment is pre-

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[1] Transportation Co. v. Wheeling, 99 U. S. 273 (*supra*, Sec. 186).

[2] Yost v. Lake Erie Transportation Co., 6th Circuit, 112 Fed. 746.

[3] See 2 Dillon on Municipal Corporations, Sec. 786 *et seq.* and cases cited.

[4] Old Dominion Co. v. West Virginia, 198 U. S. 299, 49 L. Ed. 1059 (1905), affirming 102 Va. 576.

sumptive evidence of *situs* for taxation, it is not conclusive. Ocean-going tug-boats were declared subject to taxation by the State of Washington, because they were used exclusively in the waters of that State, although they were registered and owned in the State of California.[1] The court said in that case, l. c., p. 215:

"Sound reasons exist for the right of the State to tax these vessels that are permanently here transacting local business. They receive the full protection of the local government, and if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this State. Such construction should not be adopted unless imperatively demanded by superior authority. Under the revenue law of this State, personal property is taxed at its *situs*, and without reference to the residence of the owner."

And it was also said, quoting from the Supreme Court of Alabama:

"The question indeed is at last one of *situs* in fact, and where this is shown, neither foreign registry nor foreign ownership is of any consequence."

It was held, however, by the Supreme Court of Florida, that steamboats belonging to a New York company and registered in New York, employed during the winter season on the St. John's River, but during the remainder of the year in such waters as would be most profitable in other parts of the country, were not taxable in Florida. The court said:

"We do not say that registration in a foreign port and non-resident ownership should control absolutely. But such ownership and registration render them primarily and presumptively taxable only in their home port."[2]

§ 207. **State Cannot Tax Privilege of Navigating Public Waters.**—The power of the State is limited to the taxation of

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[1] Northwestern Lumber Co. v. Chehalis County (Wash.), 54 L. R. A. 212. See also National Dredging Co. v. State, 99 Ala. 462.

[2] Johnson v. De Bary-Baya Merchants' Line, 37 Fla. 499, 37 L. R. A. 518.

boats and other instrumentalities of commerce as property. Thus a municipal ordinance of the city of New Orleans, imposing a license on the business of running tug tow-boats to and from the Gulf of Mexico, was an attempted regulation of commerce and invalid.[1] The Supreme Court said that it is undoubtedly true, as has often been judicially declared, that vessels engaged in foreign and interstate commerce and duly enrolled and licensed under the Acts of Congress may be taxed by State authority as property, provided the tax is not a tonnage duty and is levied only at the port of registry, and the vessels are valued like other property in the State, without unfavorable discrimination on account of their employment. It added, p. 75:

"The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boats in this way, he shall not be permitted to act under, and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is, which is the superior authority; and reduced to that, it furnishes its own answer."

The principle is the same, whether the vessels are owned by a home or a foreign corporation. Thus a foreign corporation, whose vessels while *en route* between the ports of two different States stop at the port of a third State, is not liable at that port for a license tax, because it there leases a wharf or landing, and has a plant and machinery for the taking on and discharge of its freight and passengers, employees, an agent, a bank account and an office, and occasionally purchases supplies. All such operations are an essential and integral part of interstate busi-

[1] Moran v. New Orleans, 112 U. S. 69, 28 L. Ed. 653 (1884).

ness, and the State cannot impose a tax upon the privilege of conducting such business.[1]

§ 208. **Steam Tugs Cannot Be Taxed for Privilege of Navigating Rivers.**—The same principle has been applied by the Supreme Court to steam tugs engaged in the business of towing vessels into and out of the Chicago river and harbor from and to the lake. They were engaged in interstate and foreign commerce, their business could not be distinguished from that in which the vessels towed were engaged, and they could not be compelled to pay a license fee to the city of Chicago.[2] It was also immaterial that the Chicago river had been deepened for navigation purposes by dredging, under the direction and at the expense of the city, for the license was not exacted as a toll for the specific purpose of improving the river, and the case therefore did not come within the principle of those decisions which hold that a tax or toll levied by a State upon those using its rivers and harbors improved at its own cost is not in violation of the Federal Constitution.[3] The opinion, referring to one of these cases, Sands v. Manistee River Improvement Co., *infra*, Sec. 212, said, p. 412:

"When the case came before this court it was held that the internal commerce of a State, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the general government, and, to encourage the growth of that commerce and render it safe, States might provide for the removal of obstructions from their rivers and harbors and deepen their channels and improve them in other ways, and levy a general tax or toll upon those who use the improvements to meet their cost, provided the free navigation of the waters, as permitted by the laws of the United States, was not impaired, and provided any system for the improvement of their navigation instituted by the general government was not defeated. No legislation of

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[1] Clyde S. S. Co. v. City Council of Charleston, 76 Fed. 46.

[2] Harman v. City of Chicago, 147 U. S. 396, 37 L. Ed. 216 (1893), reversing 140 Ill. 374. See also Frere v. Von Schoeler, 47 La. Ann. 324.

[3] Sands v. Manistee River Impt. Co., 123 U. S. 288, 31 L. Ed. 149 (1887), Huse v. Glover, 119 U. S. 543, 30 L. Ed. 487 (1886), *infra*, Sec. 194.

Congress was, by the statute of Michigan, in that case interfered with, nor any right conferred, under the legislation of Congress, in the navigation of the river by licensed or enrolled vessels, impaired, defeated or burdened in any respect. It was the improvement of a river wholly within the State, and, therefore, until the Congress took action on the subject, wholly under the control of the authorities of the State."

§ 209. **The State May, However, Tax the Privilege of Carrying on the Towing Business in a Corporate Capacity.**—An annual license fee equal to five-tenths of one per cent upon the gross earnings from transportation originating and terminating within a State, which was imposed by New York upon transportation and transmission corporations as an assessment for the privilege of carrying on business in the State in a corporate and organized capacity, was not an invalid regulation of commerce as applied to a public navigation company engaged in the business of towing upon the Hudson River under the authority granted by the United States, since the charge was not upon the navigation of the river, but upon the doing of business within the State as a corporation of the State, which could be carried on by individuals without paying any charge.[1]

§ 210. **Police Control By State Over Vessels in Harbor or in Transit.**—The police control of the State or of a municipality acting under State authority is co-extensive with its jurisdiction. Pilot and harbor regulations, when not in conflict with the Federal Constitution or Federal regulation, are valid. But vessels in transit are not within the jurisdiction of the State so as to be subject to the local license taxes, as for selling liquors on board.[2] Police regulations, however, licensing and regulating public exhibitions on board steamboats in the harbor[3] have been

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[1] New York *ex rel*, Cornell Co. v. Sohmer, 235 U. S. 549, 59 L. Ed. 359 (1915), affirming 206 N. Y. 651.

[2] State v. Frappart, 31 La. Ann. 340.

[3] A city ordinance exacting a license from boats in the Mississippi river was held invalid as to a towboat licensed under Act of Congress in the coasting trade, St. Louis v. Coal Co., 158 Mo. 342. For earlier State cases sustaining licenses held invalid under the rule in Moran v. New Orleans, *supra*, Sec. 207, and Harman v. Chicago, *supra*, Sec. 208,

held valid as police regulations and not invalid as regulations of commerce.[1]

In Kentucky a license tax upon any person residing upon a boat in a navigable river was held valid.[2] The court said in that case that plaintiff had no right to use the public highway except in common with the public and in pursuance of the purposes of its dedication, unless by consent of the government; that the waters of the Ohio were within the jurisdiction of Kentucky and the statute in question was justified under the police power.

§ 211. **Power of State to License Oyster Boats and Fisheries.**—Subject to the paramount right of navigation, the regulation of which has been granted to the Federal government, each State owns the beds of all tide-waters and public waters within its jurisdiction, and may appropriate them to be used as a common by its citizens.[3] Thus a State may provide that none may take, plant or cultivate oysters under its tidal waters, except such as shall be licensed, and may confine the right to obtain licenses to its own citizens.[4] But a statute prohibiting the use of vessels to buy oysters on Chesapeake Bay, unless under license obtained from the State conditioned upon a twelve months residence therein and payment of a tonnage fee, was unconstitutional on the double ground that it denied to citizens of other States the privileges enjoyed by citizens of that State and that it imposed a tonnage tax.[5] A license fee, however, of three dollars per ton, required from every vessel employed in dredging for oysters within the waters of the State was held a valid exercise of the State's proprietary rights.[6] A vessel enrolled and licensed under the laws of the United States is not on

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see Chilvers v. People, 11 Mich. 43; Lightburne v. Taxing District, 4 Lea 219; Newport v. Taylor, 16 B. Monroe 699; New Orleans v. Eclipse Towboat Co., 33 La. Ann. 647.

[1] Board of Selectmen v. Spalding, 8 La. Ann. 87.

[2] Robertson v. Commonwealth of Kentucky, 19 Ky. Law Rep. 442.

[3] McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248 (1877).

[4] State v. Corson, 65 N. J. L. 502, 50 Atl. Rep. 780.

[5] Booth v. Lloyd (Md.), 33 Fed. 598.

[6] Dize v. Lloyd (Md.), 36 Fed. 651; State v. Loper, 46 N. J. L. 321; Morgan v. Commonwealth (Va.), 98 Va. 812.

that account exempt from such State regulations.[1] "The right which the people of the State thus acquire" in the oyster beds and fisheries "comes not from their citizenship alone, but from their citizenship and property combined," in the language of the Supreme Court in McCready v. Virginia. "It is in fact a property right, and not a mere privilege or immunity of citizenship." The State therefore determines the conditions on which the products of the oyster beds and fisheries become subjects of commerce.

§ 212. **State May Exact Tolls for Using Rivers and Harbors Improved At Its Own Cost.**—A State may make improvements in a navigable stream within its borders and collect reasonable tolls from vessels as a compensation for using the improved facilities. This principle was first applied by the Supreme Court[2] in holding valid the regulations made by the city of Chicago for the use of the Chicago river. The court said that, until Congress acted, the State of Illinois had plenary authority over the bridges across the river and could vest in the city of Chicago jurisdiction over the construction, repair and use of such bridges, and that there was nothing in the Northwestern Ordinance of 1787 or in the subsequent legislation of Congress, which precluded the State from exercising this power.

The principle was further applied in sustaining the right of the State to exact tolls from vessels passing through the Illinois river, which had been improved at the expense of the State.[3] Such a charge, said the court, was not a duty upon tonnage but was analogous to a charge for the use of wharves and docks constructed to facilitate the landing of passengers and freight and taking them on board and for the repair of vessels. In this case the rates of toll were prescribed according to the tonnage of the vessels and the amount of freight carried by them through the locks of the river. The court said that this was simply a mode of fixing the rate according to the size of the vessel and the

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[1] Manchester v. Massachusetts, 139 U. S. 240, 35 L. Ed. 159 (1891); Smith v. Maryland, 18 How. 269, 15 L. Ed. 269 (1855).

[2] Escanaba Company v. Chicago, 107 U. S. 678, 27 L. Ed. 442 (1883).

[3] Huse v. Glover, 119 U. S. 543, *supra*.

amount of property it carried, and was in no sense a duty upon tonnage within the prohibition of the Constitution.

The question came before the court again in a case involving the improvement made by the State of Michigan in the Manistee river.[1] The court held that, as the Manistee river was wholly within the limits of Michigan, the State could authorize any improvement which in its judgment would enhance the value of the river as a means of transportation from one part of the State to another, and to meet the cost of such improvement the State could levy a general tax or lay a toll upon all who used the river and harbors as improved. It was urged that the terms of the Northwestern Ordinance, respecting the freedom of the navigable waters of the territory, bound the people of the territory when subsequently formed into States. The court replied that, although it was doubtless supposed by the framers of that ordinance that its words would always be considered a binding obligation, yet, from the very conditions under which the States formed from its territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. But, independently of this consideration, nothing in the ordinance prevented the State from improving the river and charging a reasonable toll as compensation for the improvement.

§ 213. **Taxation of Ferries and Bridges.**—The establishment and licensing of ferries[2] and the establishment of bridges across the navigable waters of a State[3] are within what is termed the concurrent jurisdiction of the State and Federal governments in the regulation of commerce. As to this class of cases, it is not the mere existence of the power but its *exercise* by Congress, which is incompatible with the exercise of the same power by the States, and the latter may legislate in the absence of congressional legislation. The State may therefore establish and license a ferry or a bridge over a navigable stream, though the latter must

[1] Sands v. Manistee River Improvement Co., 123 U. S. 288, *supra.*

[2] Conway v. Taylor, 1 Black 603, 17 L. Ed. 191 (1861).

[3] Cardwell v. American Bridge Co., 113 U. S. 205, 28 L. Ed. 959 (1885); Covington Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. Ed. 962 (1894).

be approved by Congress as being a lawful structure not interfering with navigation, and it was held by the Supreme Court in a recent case[1] that Congress alone possesses the requisite power to regulate charges upon such a bridge.

There is a distinction between bridges and ferries over navigable rivers which separate States, and those which are wholly within the limits of a State, as Congress has no control over commerce which is entirely within the limits of a State.[2]

Applying the principle declared in the cases above quoted, distinguishing between the property employed as instrumentalities of commerce and the business of conducting the commerce itself, the taxing power of the State would seem to be limited in the taxation of bridges and ferries to the taxation of the property employed therein, such as the bridge and approaches, the ferry-boats and other property of the ferry. The Supreme Court sustained, however,[3] a license of a certain sum for each boat levied by the city of East St. Louis upon the ferry company, saying that the power to license is a police power, although it can also be used for purposes of revenue, and that the exaction of the license fee by the State within which the property had its *situs* was not a regulation of commerce. The license fee was levied, not on the ferry-boat, but on the ferry-keeper.[4]

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[1] Covington Bridge Co. v. Kentucky, *supra*. Four judges dissented, holding that the States had the power to regulate tolls both on bridges and ferries, subject to the paramount authority of Congress, and the failure of Congress to act manifested its intention that the rates of toll should be as established by the two States, in the case of an interstate bridge.

[2] See United States v. Morrison, Federal Cases No. 15,465; but see also United States v. Jackson, Federal Cases No. 15,458.

[3] Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. Ed. 419 (1883), affirming the Supreme Court of Illinois, 102 Ill. 514.

[4] This case was referred to in the opinion in Covington Bridge Co. v. Kentucky, *supra*. In United States Express Co. v. Allen, 39 Fed. 714, it is said that the Supreme Court in Leloup v. Mobile, 127 U. S. 640, 32 L. Ed. 311 (1888), substantially overrules this case, as well as that of Osborne v. Mobile, 16 Wall. 479, 21 L. Ed. 470 (1873), and that the language of the court, though directed to the Osborne case, must in principle apply with equal force to the Wiggins Ferry case. Wiggins Ferry Co. v. East St. Louis was also distinguished by the United States

Thus a Kentucky corporation, operating a ferry across the Ohio river, was held to be deprived of its property without due process of law by the action of that State in including for the purposes of taxation in the valuation of the franchise derived by the corporation from Kentucky, the value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore, which the corporation had acquired.[1]

An unconstitutional burden was also held to be imposed upon interstate commerce by the Illinois law of 1874, Chapter 55, penalizing the carrying on of a ferry service without a license, when applied to the transportation of loaded or unloaded railroad cars across the Mississippi river from the Illinois to the Missouri shore. The court said that even assuming that the State may regulate a ferry between two States, the statute made the granting of a license discretionary, with the citizens of Illinois preferred, and compelled the licensee to conduct a general ferry business.[2]

The same principle was applied in holding that neither a city or municipality acting under its authority could require a Canadian corporation operating a ferry over a boundary stream lying between such State and Canada to take out a license and to pay a license fee as a condition precedent to receiving and landing persons and property at its wharf in such municipality.[3]

Circuit Court for the Southern District of Illinois, in St. Clair County v. The Interstate Car Transfer Co., 109 Fed. 741, where it was held that the county of St. Clair, wherein the city of East St. Louis is situated, could not exact a license fee for the operation of a ferry transferring railroad cars across the Mississippi from East St. Louis to St. Louis. There the corporation owning and operating the ferry was a Missouri corporation domiciled in St. Louis, and the boats had their *situs* in St. Louis, and the only property in Illinois consisted of a landing place and facilities.

[1] Louisville, Etc., Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. Ed. 513 (1903), reversing 22 Ky. Law Rep. 446.

[2] St. Clair County v. Interstate Land & C. Co., 192 U. S. 454, 48 L. Ed. 518 (1904), affirming 109 Fed. 741.

[3] Sault Ste. Marie v. International Transit Co., 234 U. S. 333, 58 L. Ed. 1337 (1914).

§ 214. **Gloucester Ferry Co. v. Pennsylvania.**—The ferry-boats between Gloucester in New Jersey and the city of Philadelphia belonged to a New Jersey company and were registered in Camden, N. J. No property was owned by the company in Philadelphia except the docks where the boats were landed and where they remained only long enough to receive and discharge passengers and freight. The Supreme Court, reversing the Supreme Court of Pennsylvania,[1] decided that the ferry company was not taxable in Pennsylvania upon its capital stock. Its business was interstate commerce, and, whether this was conducted by individuals or corporations, the property employed in it could be taxed only where it had its taxable *situs*.

After reviewing the cases, the court stated at page 217, that, although the privilege of keeping a ferry, with the right to take toll for passengers and freight, is a franchise grantable by the State, still the fact remains that such a ferry is a necessary means of commercial intercourse between the States bordering on their dividing waters, and it must therefore be conducted without the imposition by the States of taxes or other burdens upon the commerce between them. Freedom from such impositions does not of course imply exemption from reasonable charges for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of interstate transportation.

"How conflicting legislation of the two States on the subject of ferries on waters dividing them is to be met and treated is not a question before us for consideration. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware river. Any one, so far as her laws are concerned, is free, as we are informed, to establish such ferries as he may choose. No license fee is exacted from ferry-keepers. She merely exercises the right to designate the places of landing, as she does the places of landing for all vessels engaged in commerce. The question, therefore, respecting the tax

[1] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158 (1885).

in the present case is not complicated by any action of that State concerning ferries. However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

§ 215. **Taxation of Interstate Bridges.**—Bridges over navigable rivers separating two States have been held properly taxable by each State for that part of the tangible and intangible property of the bridge located therein.[1] The court said that the company was chartered by the State of Kentucky to build and operate a bridge, and that State could properly include the value of the franchises it had granted in the valuation of the company's property. The Act of Congress conferred on the company no right or franchise to erect the bridge or to collect tolls for its use. It merely regulated the height of the bridge over the river and the width of its spans, in order that it might not interfere with navigation.

In a later case[2] the same bridge company was held properly taxable by the city of Henderson on so much of its property as was permanently between low water mark on the Kentucky shore and low water mark on the Indiana shore of the Ohio River, it being settled that the boundary of Kentucky extended to that point, and that the power of Kentucky to tax the bridge was not affected by the fact that it was erected by the authority and with the consent of Congress.

§ 216. **Taxation of Interstate Bridge Not Interference With Interstate Commerce.**—As to the alleged interference with interstate commerce, the court said, at p. 153:

"Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried

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[1] Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. Ed. 953 (1897); Justices White, Field, Harlan and Brown dissenting, affirming 31 S. W. 486.

[2] Henderson Bridge Co. v. Henderson, 173 U. S. 592, 43 L. Ed. 823 (1899), affirming 36 S. W. 561. See *infra*, Ch. VII, "Taxation of Interstate Carriers."

on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted."

In a later case, involving the taxation of the Keokuk and Hamilton Bridge, the boundary line which divided the bridge was declared to be the boundary line between the two States of Iowa and Illinois, and this was the middle of the main navigable channel of the Mississippi river. The determination therefore of the line which divided the bridge between the two States was a question of fact, and it was not within the province of the court to review the findings of the Supreme Court of Illinois as to the part assessed in Illinois.[1] It was claimed in this case that no part of the capital stock was assessable, because the tax upon it was a tax upon interstate commerce and upon a franchise conferred by the Federal government, but this position was adjudged untenable.

The increased value of a track by reason of a bridge, when the bridge is part of a line of railway, in another case was said to be properly taken into consideration in the assessment of the value of the track, the separate assessment of the value of the bridge and track being a difference of form rather than of substance.[2]

§ 217. **Taxation of Tonnage.**—The prohibition of any tax upon tonnage was obviously supplementary to the grant to Congress of control over interstate and foreign commerce, and should be construed in connection therewith.

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[1] Keokuk & Hamilton Bridge Co. v. Illinois, 175 U. S. 626, 44 L. Ed. 299 (1900), affirming 176 Ill. 267.

[2] Pittsburgh, Etc., R. Co. v. Board of Public Works of West Virginia, 172 U. S. 32, 43 L. Ed. 354 (1898); see also Lumberville Bridge Co. v. State Board of Assessors, 55 N. J. L. 529, and 25 L. R. A. 134, holding that a tax by the State of New Jersey of one-tenth of one per cent upon the whole of the capital stock of a bridge company, incorporated for building a bridge between New Jersey and Pennsylvania and requiring concurrent legislation of both States, was valid.

What is a tax upon tonnage within the meaning of this prohibition can only be determined by the judicial process of inclusion and exclusion. A duty upon tonnage within the meaning of the Constitution is a charge upon a vessel as an instrument of commerce according to its tonnage, for the privilege of entering or leaving a port or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind on trading in vessels.[1]

The prohibition however, is not limited to charges based upon tonnage. Thus a statute of Louisiana, that the Master and Wardens of the Port should be entitled to demand and receive in addition to other fees the sum of five dollars, whether called on to perform any service or not, for every vessel arriving in port, was declared to be a duty on tonnage. The court said at page 34:

"In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. . . . It was not only a pro rata tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonage with the rate of duty."[2]

In the State Tonnage Tax Cases from Alabama,[3] a tax levied by Alabama on all steamboats, vessels and other craft plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage, was held to be a tax upon tonnage, and the language of the act showed clearly that it was intended to be a tax on the boats as instruments of commerce and not as property in the State. The court said that it was immaterial whether the ships or vessels taxed belonged to citizens of that State or to citizens of other States, as the prohibition was general, withdrawing altogether from the State the power to lay any duties on tonnage, under any circumstances, without the consent of Congress.

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1 See Huse v. Glover, 119 U. S. 543, *supra.*

2 Steamship Co. v. Portwardens, 6 Wall. 31, 18 L. Ed. 749 (1867).

3 12 Wallace 204, 20 L. Ed. 370 (1871).

An ordinance of the city of New Orleans levying duties at the rate of ten cents per ton on all steamboats mooring or landing at the port, if in port not exceeding five days, and of five dollars per day after the five days, though the port of New Orleans includes some twenty-two miles on which wharves had been built for only about two miles, was a tax upon tonnage in violation of the Constitution.[1] The court said that it could not be supported as a compensation for the use of the city's wharves and was really a tax for the privilege of arriving and departing from the port. A fee of one and one-half cents per ton, required by the New York statute to be paid by all ships or vessels entering the ports of New York and loading or unloading therein, was a tax upon tonnage.[2]

So also was an act of Texas invalid, which required every vessel arriving at quarantine stations in the State to pay five dollars for the first one hundred tons and one and one-half cents for each additional ton. As this was for defraying the expenses of the quarantine regulations, it was claimed to be justified by the decision in Gibbons v. Ogden, where the court speaks of quarantine and inspection laws as being within the jurisdiction justly exercised by the States themselves in the regulation of commerce. The Supreme Court said[3] that, while the power to establish quarantine laws rests with the States, it cannot be exercised in violation of the restrictions imposed by the Federal Constitution upon their taxing power, and the tax was adjudged invalid as being upon tonnage. An example of a valid quarantine regulation, involving the payment of a fee graduated according to tonnage, may be found in Morgan's Steamship Co. v. Board of Health.[4]

A law of New York which provided that the master, owner or assignee of every steamboat or vessel entering the port of Albany, or loading, unloading or making fast to any wharf thereof, shall within forty-eight hours after the arrival therein

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[1] Cannon v. New Orleans, 20 Wallace 577, 22 L. Ed. 417 (1874).
[2] Inman Steamship Co. v. Tinker, 94 U. S. 238, 24 L. Ed. 118 (1877).
[3] Peete v. Morgan, 19 Wallace 581, 22 L. Ed. 201 (1874).
[4] 118 U. S. 455, 30 L. Ed. 237 (1886).

pay to the Harbor Master for his services a sum of one and one-half cents per annum, which shall be computed upon the registered tonnage of such steamboat or vessel, was adjudged void as imposing a tonnage tax in violation of the Constitution.[1]

§ 218. **Property Taxation and Compensation for Services Distinguished From Tonnage.**—A property tax levied upon the vessel as property, where it has a taxable *situs*, is not a duty upon tonnage. Thus in Transportation Co. v. Wheeling,[2] the boats used in navigating the Ohio river between Wheeling and Parkersburg, and, when not in use, laid up at Wheeling, owned by a West Virginia company, whose principal office was at Wheeling and whose stock belonged principally to citizens of West Virginia and Ohio, were held properly taxable at Wheeling. A tax so levied moreover was not a tax upon tonnage. The court said that taxes levied by the State upon vessels owned by its citizens as property, based on the value of the same as property, are not within the prohibition of the Constitution, and that assessments of this kind, when levied for municipal purposes, must be made against the owner of the property and can only be made in the municipality where the owner resides.

On the other hand it is not a duty upon tonnage where the charge imposed is only a reasonable charge for services rendered, as for the use of an improved wharf in a municipality, even if the charge is proportioned to the tonnage of the vessel. Such charges have been sustained in a number of cases.[3]

Thus, in the case of Transportation Company v. Parkersburg, the exaction of the fee was sustained, although plaintiff claimed that the rates charged were exorbitant and were merely a pretext for a duty on tonnage. But the court refused to inquire into the secret purpose of the city. Upon the distinction between a duty on tonnage and wharfage charges it said:

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[1] Way v. New Jersey Steamboat Co., 133 Fed. 188 (1908).

[2] 99 U. S. 273, *supra.*

[3] Packet Co. v. Keokuk, 95 U. S. 80, 24 L. Ed. 377 (1877); Packet Co. v. St. Louis, 100 U. S. 423, 25 L. Ed. 688 (1880); Vicksburg v. Tobin, 100 U. S. 430, 25 L. Ed. 690 (1880); Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. Ed. 1169 (1882); Transportation Co. v. Parkersburg, 107 U. S. 691, 27 L. Ed. 584 (1883).

§ 219. **Supreme Court on Tonnage Duties and Wharfage Charges.**—"When the Constitution declares that 'No State shall, without the consent of Congress, lay any duty of tonnage;' and when Congress, in Sec. 4220 of the Revised Statutes, declares that 'no vessel belonging to any citizen of the United States, trading from one port within the United States to another port within the United States, or employed in the bank, whale or other fisheries, shall be subject to tonnage tax or duty, if such vessel be licensed, registered, or enrolled,' they mean by the phrases, 'duty of tonnage,' and 'tonnage tax or duty,' a charge, tax, or duty on a vessel for the privilege of entering a port; and although usually levied according to tonnage, and so acquiring its name, it is not confined to that method of rating the charge. It has nothing to do with wharfage, which is a charge against a vessel for using or lying at a wharf or landing. The one is imposed by the government, the other by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon considerations having reference to its commerce, or revenue; the other is a rent charged by the owner of the property for its temporary use. It is obvious that the mode of rating the charge in either case, whether according to the size or capacity of the vessel, or otherwise, has nothing to do with its essential nature. It is also obvious that since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant."[1]

§ 220. **Wharfage Charges May be Graduated by Tonnage.** Charges for wharfage may be graduated by the tonnage of vessels using the wharves, and this is not a duty on tonnage. An ordinance of New Orleans therefore fixing the rates at so much per ton for using the new wharf, the proceeds being used to repair

[1] The opinion contains an exhaustive review of the cases, but holds that the reasonableness of the charge for wharfage must be determined by the laws of the State within whose jurisdiction the wharf is situated. Justice Harlan dissented, holding that the courts of the Union are empowered to protect the rights of free commerce against unreasonable exactions.

that wharf and construct new ones, was valid.[1] The tolls levied by the State of Illinois upon the passage of vessels through the locks of the Illinois upon the passage of vessels through the locks of the Illinois river, as compensation for the outlay of the State in improving the navigation of the river, were held to be valid on the same principle, as the State was allowed to charge compensation for the use of wharves and docks, and there was nothing in the objection that the rates of toll were according to tonnage and the amount of freight.[2]

§ 221. **But Wharfage and Similar Charges Must be Without Discrimination.**—But the right of the State, or municipality acting under State authority, to make reasonable charges for the use of improved wharves and similar privileges is subject to the qualification incident to the exercise of its taxing authority by a State in any case, that it must be without discrimination against the citizens and products of other States. This was forcibly illustrated in the case of Guy v. Baltimore,[3] where a city wharfage charge had been in force some fifty years and was declared invalid as interfering with commerce, on the ground that it was exacted only from vessels transporting goods or articles other than the products of the State. It was argued that the city, as the owner of the wharves, had the right to permit their free use by vessels loaded with the products of Maryland, and that others could not complain so long as they were not required to pay more than a reasonable compensation. The court said that the vice was in the discrimination, and that the city could no more discriminate in the use of the wharves than it could in the use of the public streets or other highways. If it permitted citizens of that State to use them without charge, it must give the same privilege to citizens and vessels of other States, and the State could, by neither direct nor indirect means, build up its domestic commerce through the imposition of unequal and oppres-

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[1] Ouachita Packet Co. v. Aiken, 121 U. S. 444; 30 L. Ed. 976 (1887).

[2] Huse v. Glover, 119 U. S. 543, *supra;* see also Escanaba Co. v. Chicago, 107 U. S. 678, *supra;* Sands v. Manistee Improvement Co., 123 U. S. 288, *supra.*

[3] 100 U. S. 434, 25 L. Ed. 743 (1880).

sive burdens upon the business and industries of other States. The opinion continues at page 443:

"Such exactions, in the name of wharfage, must be regarded as taxation upon interstate commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations."

§ 222. **Quarantine and Pilotage Charges.**—Inspection laws of the State are expressly authorized by the Constitution, see *supra,* Sec. 129, and quarantine laws belong to that class of State legislation which is valid until forbidden by Congress, unless it covers the same ground that is covered by the legislation of Congress.[1] In the absence of such Federal legislation, Congress is deemed to have, in effect, adopted the State laws and forbidden interference with their enforcement. The fees collected under the quarantine laws of Louisiana were therefore valid; they were not tonnage taxes within the meaning of the word as used in the Constitution, but compensation for services rendered. The court said, at page 463, that the fee complained of, $30 a vessel, was not a tax within the meaning of that word as used in the Constitution, nor did the exaction of the fee amount to a regulation of commerce under the Constitution.[2] The enforcement of these quarantine regulations and the collection of these charges did not give the ports of any other State a preference over those of Louisiana.

State pilotage laws and the fees connected therewith for pilotage services were held by the Supreme Court in the leading case[3] to be regulations of commerce of the class which do not require a uniform rule and which can properly be governed by rules varying with the locality, subject however, to the paramount control of Congress whenever Congress deems proper to ex-

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[1] Morgan's Steamship Co. v. Louisiana, 118 U. S. 455, 30 L. Ed. 237 (1886).

[2] Justice Bradley dissented.

[3] Cooley v. Port Wardens, 12 Howard 229, 13 L. Ed. 996 (1851).

ercise its power.[1] The court in this case sustained the act of Pennsylvania, according to which a vessel refusing to take a pilot forfeited to the Master Warden of the Pilots for the use of a society for the relief of pilots one-half of the amount of pilotage. Such a law did not give a preference to the ports of one State over those of another, nor was it a violation of the Constitution providing that the vessels to or from one State shall not be obliged to enter, clear or pay duties in another. The pilotage fees were not duties within the meaning of the Constitution. This ruling has been consistently adhered to.[2]

§ 223. **Taxation of Land Under Harbors.** — Lands under water of an harbor designated as the boundaries of the municipality have been held taxable as real estate within the municipality.[3]

It has been held that jurisdiction for taxing purposes of harbor areas and navigable waters within the defined limits of Porto Rico was not denied the Insular government by the reservation of such areas and waters in favor of the United States made by the act of April 12, 1900, and the act of July 1, 1902, which are to be construed as proprietary reservations only, and not as limitations upon the exercise of government.[4]

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[1] Sinnott v. Com. of Mobile, 22 How. 227, 16 L. Ed. 243 (1859); Foster v. Com. of Pilotage, 22 How. 245, 16 L. Ed. 248 (1859).

[2] *Ex parte* McNeil, 13 Wall. 236, 20 L. Ed. 624 (1872). See also Covington Bridge Co. v. Kentucky, 154 U. S. 204, 211, *supra;* Huus v. Porto Rico Steamship Co., 182 U. S. 392, 45 L. Ed. 1146 (1901), holding that a vessel engaged in trade between Porto Rican ports and the ports of the United States was not subject to the New York pilotage laws, because it was engaged in the coastwise commerce of the country within the meaning of the Act of Congress, subjecting such vessels to the navigation laws of the United States. This coasting trade was intended to include the domestic trade of the United States by other than interior waters. Olsen v. Smith, 195 U. S. 332, 49 L. Ed. 224 (1904).

[3] Leary v. Jersey City Co., 189 Fed. 89 (1911).

[4] Gromer v. Standard Dredging Co., 224 U. S. 362, 56 L. Ed. 801 (1912), reversing 5 Porto Rico Fed. 142.

CHAPTER VII.

TAXATION OF INTERSTATE COMMERCE.

§ 224. Difficulty of defining line between Federal and State power.
225. License taxation.
226. Osborne v. Mobile.
227. Osborne v. Mobile overruled.
228. License tax on agents of interstate railroads held invalid.
229. Immaterial that license interfering with commerce purports to be for regulation and not for revenue.
230. License for privilege of transacting local business is valid.
231. Decision of State court that license only applies to local business conclusive.
232. It must clearly appear that intra-state business alone is taxed.
233. License must not be condition for transacting interstate business.
234. License or privilege tax must not exceed amount of tax on property.
235. Tax on interstate telegraph messages invalid.
236. Privilege tax on sleeping cars.
237. Compensation exacted by city for use of poles in streets not regulation of commerce.
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239. Taxation of rolling stock.
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242. Taxation of refrigerator cars.
243. Mileage apportionment in taxation of rolling stock.
244. State tax on freight invalid.
245. State tax on railway gross receipts.
246. Mileage apportionment in interstate railway taxation.
247. Taxation of net earnings sustained.
248. Tax on gross earnings held invalid.
249. Tax on gross receipts held invalid in State courts.
250. Maine v. Grand Trunk R. R. Co.
251. Tax on gross earnings apportioned by mileage valid as excise tax.
252. Principle reaffirmed.
253. Immaterial whether corporation is domestic or foreign.
254. Tax on gross earnings when an interference with interstate commerce.

255. Tax not upon receipts as such but excise tax apportioned to receipts.
256. State tax on net receipts.
257. Valuation of property by capitalization of receipts.

§ 224. **Difficulty of Defining Line Between Federal and State Power.**—The most important and difficult questions, in defining the line between the Federal regulation of commerce and the taxing power of the State, have arisen in connection with taxation upon the great railroad, telegraph and express systems, which penetrate the different States and transact both local and interstate business. Every form of taxation upon these great properties which has been attempted has been contested in its application, on account of alleged interference with interstate commerce. The decisions of the Supreme Court upon the questions presented in this class of cases have not been uniform, and the difficulty of defining the line where the State and Federal powers meet is illustrated by the frequent dissents in the court and the overruling of decisions by the same judges who pronounced them. Thus the court said:[1]

"Owing to the paramount necessity of maintaining untrammeled freedom of commercial intercourse between the citizens of the different States, and to the fact that so frequently transportation and telegraph companies transact both local and interstate business, it has been found difficult to clearly define the line where the State and the Federal powers meet. That difficulty has been chiefly felt by this court in dealing with questions of taxation, and is shown by the not infrequent dissents by members of the court when the effort has been made to formulate a general statement of the law applicable to such questions."

§ 225. **License Taxation.**—The exaction of license fees for the purpose of revenue is a common method of taxation, especially in the Southern States. Thus there are business, occupation and privilege taxes, which are levied both by the State directly and by the municipalities under State authority, and all of which are in some States called by the generic name of "privilege" taxes. As heretofore shown, such taxation as to

[1] Erie R. R. Co. v. Pennsylvania, 158 U. S. 437, 39 L. Ed. 1045 (1895).

all persons and occupations within the jurisdiction of the State is a legitimate method of State taxation limited only by its own discretion and the restrictions of its own constitution.[1] In some States taxes are laid in this form of license or privilege taxation, which in others are levied usually as *ad valorem* taxes upon property, and this applies to corporations, especially that class known as public utility or *quasi* public corporations, including common carriers. The amount of the license fee is sometimes graduated according to amount of earnings, or character of business, or according to capital invested, and in the latter case it does not differ materially, except in name, from *ad valorem* or property taxation. It was natural then that the forms of taxation which were customary in the States should be applied by them in the local taxation of the property and business of the interstate railroad, telegraph and express companies. As the system of taxing the State's interest in the aggregate property of such corporations was not then developed, the privilege or occupation tax seemed the only practical method, where the business transacted might be very large and the property located in the State of small value.

§ 226. **Osborne v. Mobile.**—It is an interesting illustration of the tremendous development of the transportation and commercial interests of the country in recent years, that the decisions of the Supreme Court relating to the right of the State to tax the agencies of interstate commerce, which have been so numerous during the past twenty-five years, really began after the close of the Civil War period. The first case in the Supreme Court on license taxation of an interstate carrier, that is, on the privilege of maintaining an office and doing business in the State, was that of Osborne v. Mobile, decided in 1873.[2] An ordinance of the city of Mobile required every express or railroad company doing business in that city to pay an annual license. The fee was graded, so that $500 was charged for a first-class license, where the business extended beyond the limits of the

[1] See *supra*, Ch. IV.

[2] 16 Wallace 479, 21 L. Ed. 470 (1873).

State, $100 for a second-class license for business wholly within the State, and $50 for a third-class license for business wholly within the city. The agent of an interstate express company was convicted of operating his agency without paying his license tax, and this conviction was sustained in the State Supreme Court. The judgment was affirmed by the Supreme Court, Chief Justice Chase delivering the unanimous opinion. He said in part at page 481:

"The difficulty of drawing the line between constitutional and unconstitutional taxation by the State was acknowledged and has always been acknowledged by this court; but that there is such a line is clear, and the court can best discharge its duty by determining in each case on which side the tax complained of is. It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal government in their integrity."

The court said that there was no discrimination in the tax, between the express company and the corporations and citizens of Alabama, because the license was the same for whomsoever the business was transacted; and that, as Congress has never undertaken to exercise its power to regulate commerce in any manner inconsistent with this municipal ordinance, the right of State taxation was not taken away. The court concluded at page 482:

"The license tax in the present case was upon a business carried on within the city of Mobile. The business licensed included transportation beyond the limits of the State, or rather the making of contracts, within the State, for such transportation beyond it. It was with reference to this feature of the business that the tax was, in part, imposed; but it was no more a tax upon interstate commerce than a general tax on drayage would be because the licensed drayman might sometimes be employed in hauling goods to vessels to be transported beyond the limits of the State.

"We think it would be going too far so to narrow the limits of State taxation."

§ 227. **Osborne v. Mobile Overruled.**—The decision in Osborne v. Mobile was followed by the State courts, which accordingly sustained license taxation, both by the States and munici-

palities, upon common carriers, for the privilege of conducting their business and maintaining offices within the State or city. They held that there was no interference with interstate commerce where the license was without discrimination as between citizens of the State and non-residents.[1]

About fifteen years later the question came again before the Supreme Court in reference to a license tax levied by the same city upon telegraph companies. The agent of the Western Union Telegraph Company was fined for failing to pay an annual license tax of $225, and the conviction was sustained in the State court, which overruled the defense that the license was an interference with interstate commerce.[2]

But the Supreme Court, in an exhaustive opinion by Justice Bradley, without dissent,[3] held that the ordinance was void, as the tax affected the whole of the company's business, interstate

[1] Thus, in Virginia, W. U. Tel. Co. v. Richmond, 26 Grattan 1; Tennessee, Lightburn v. Taxing District of Shelby County, 4 Lea 219, sustaining a privilege tax on a steamboat engaged in interstate commerce; Memphis & L. R. Co. v. Dolan, 14 Fed. 532, where the U. S. Circuit Court in Tennessee sustained a privilege tax on an express company engaged in interstate commerce; and in Texas, W. U. Tel. Co. v. State, 55 Tex. 314. All of these cases followed Osborne v. Mobile.

[2] The State court in its opinion, as quoted at page 644 in the opinion of the Supreme Court, said:

"We will not gainsay that this license tax was imposed as a revenue measure—as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for State or municipal purposes can be derived from the agencies or instrumentalities of commerce, no one will contend. The question generally mooted is, how shall this end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come from any attempt to collate, explain and harmonize them. We will not attempt it. We confess ourselves unable to draw a distinction between this case and the principle involved in Osborne v. Mobile, 16 Wall. 479. In that case the license levy was upheld, and we think it should be in this."

[3] Leloup v. Mobile, 127 U. S. 640, 32 L. Ed. 311 (1888). Three of the Justices, Bradley, Miller and Field, had concurred in Osborne v. Mobile.

as well as local, and that the business of telegraphing is commerce between the States. The telegraph company was moreover invested with the powers and privileges conferred by the Act of Congress of July 24, 1866, which declared that the erection of telegraph lines should, as against State interference, be free to all who accepted the terms of the act, and that a telegraph company of one State should not, after accepting such terms, be excluded by another from prosecuting its business within her jurisdiction.[1] The decision of the court however was not based upon this Act of Congress, but upon the broad ground that the State could not tax the privilege of transacting interstate commerce. It was said that as the State could not tax interstate commerce, it could not tax the privilege of conducting that commerce.

With reference to the case of Osborne v. Mobile, upon which the State court had relied, the court said, page 647, after reciting the terms of the ordinance sustained in that case:

"This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States."

And added, l. c., p. 648:

"A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to refer to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions which have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts."

[1] As to this Act of Congress see Pensacola Telegraph Co. v. W. U. Tel. Co., 96 U. S. 1, 24 L. Ed. 708 (1877).

The conclusion was therefore, l. c., page 648:

"That no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

It was also said that this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located in the State, as it taxes the property of other citizens.

§ 228. **License Tax on Agents of Interstate Railroads Held Invalid.**—The same principle was applied to license taxes imposed for maintaining offices in which to conduct interstate business. Thus the agent of the New York, Lake Erie & Western Railroad, which extends from Chicago to New York, maintained an office in San Francisco for the purpose of inducing passengers going from that point to New York to take the line of his railroad at Chicago. He was on that account convicted of doing business in San Francisco, in violation of the ordinance of that city requiring the payment of $25 quarterly for a license. The conviction was sustained by the California court, but was reversed by the Supreme Court.[1] It was argued that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commerce at all, was so remotely connected with it that the license tax could not be regarded as an interference. But the court said that this distinction was immaterial, for the business was interstate and the tax involved the licensing of the commerce of the road to an extent commensurate with the amount of business done by the agent.

This ruling was followed in the case of the license tax imposed by the State of Pennsylvania upon the Norfolk & Western

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[1] McCall v. California, 136 U. S. 104, 34 L. Ed. 391 (1889), Chief Justice Fuller and Justices Brewer and Gray dissenting.

Railroad Company,[1] which maintained an office in Philadelphia for the use of its offices and employees, the road being a link in a through line of road by which passengers and freight were carried into the State and from that State into others. The tax was declared invalid, as the office was maintained to meet the necessities of the company's interstate business, and the tax upon it was declared to be upon one of the means and instrumentalities of interstate commerce.

§ 229. **Immaterial that License Interfering With Commerce Purports to be for Regulation and Not for Revenue.**—The State cannot interfere with interstate commerce by exacting a privilege tax for conducting that commerce, and it is immaterial whether such license is required as a means of police regulation or for purpose of revenue. Thus an act of the State of Kentucky required all agents of foreign express companies, before carrying on business within its jurisdiction, to procure licenses, and preliminary thereto to satisfy the State Auditor that their companies had each an actual capital of not less than a certain amount; so that the license was claimed to be one for regulation, rather than for revenue. The Supreme Court held,[2] reversing the Court of Appeals of Kentucky, that the distinction between a license for regulation and one for revenue was not material, and that the State could enforce such police regulations with reference to the local business of the company, but not as to its interstate business. It said that the decisions of the court clearly established that neither licenses nor indirect taxation of any kind, nor any system of State taxation, can be imposed upon interstate any more than upon foreign commerce, and that all acts of legislation producing any such result are to that extent unconstitutional and void.

§ 230. **License for Privilege of Transacting Local Business is Valid.**—While the State can license the interstate business of common carriers neither by way of regulation nor by way of

[1] Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. Ed. 394 (1889).

[2] Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649 (1890), Chief Justice Fuller and Justice Gray dissenting. See Commonwealth v. Smith, 92 Ky. 38, following the above decision and holding void another express company license.

revenue, it can license both for regulation and revenue the privilege of conducting *local* business, that is, business within the State, though the same company may be engaged at the same office in transacting business beyond the State. Accordingly a Missouri statute imposing a tax upon express companies in proportion to the gross receipts, but only on the receipts for business done within the State, as distinguished from interstate business, was held valid.[1] This was not a license or privilege tax, but the distinction between business within the State and business beyond the State has been applied in cases of license taxation.

Thus a license tax was imposed by the city of Charleston on all persons engaged in any business, trade or profession in that city. The tax was limited by the ordinance to business done exclusively within the city of Charleston, so that it did not include that to or from any points without the city, nor any done for the government of the United States, its officers or agents.[2] It was claimed that the Postal Telegraph & Cable Company was not within the terms of this ordinance, because it did not do any business exclusively within the city of Charleston; that its city offices were merely initial points for sending out messages, and that if license exactions were allowed to and made by the various cities in the State, great injury and wrong would be done the telegraph company. But the court sustained the license tax, and said that, if hardship resulted, it was not within the power of the court to redress it. The privileges conferred upon the company by the Act of Congress were not inconsistent with the right on the part of a State in which the business was done and the property acquired to tax the same, within the limitations of the Constitution. The court distinguished this case from that of Leloup v. Port of Mobile, on the ground that the tax in that case affected the whole business, including that which was interstate.

Thus a franchise tax imposed under the statutes of the State of New York upon the Pennsylvania Railroad Company for the

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[1] Pacific Express Co. v. Seibert, 142 U. S. 339, 35 L. Ed. 1035 (1892), affirming 44 Fed. 310.

[2] Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 38 L. Ed. 871 (1894), Justices Harlan, Brown and Jackson dissenting.

carrying by a cab service wholly within the State its passengers to and from its landing in New York City, the charges for which were entirely separate from those of other transportation, was not an unlawful burden upon interstate commerce, but a tax upon an independent local service.[1]

An annual business tax enacted by a municipality upon an express company, including wares of an interstate character and business done for the government, and covering solely the local business done at that point in receiving packages transported from other points in the State and in transporting packages to like points, is not invalid because such transportation is over a route which for a short distance passes out of the State.[2]

§ 231. **Decision of State Court that License Only Applies to Local Business Conclusive.**—The principle was thus established that the State, or municipality acting under the authority of the State, can tax a common carrier, that is, a railroad, telegraph or express company, for the privilege of conducting a local business, but cannot tax an interstate business. Not only is the license held valid, if it is expressly imposed upon the privilege of conducting the local business only, but the decision of the State court that the license is to be construed as thus limited in its application, is conclusive upon the Supreme Court.[3] Thus it was said by the court in a case where a license tax was imposed by the State of Florida upon express companies, page 654:

"In other words this statute as construed by the Supreme Court of Florida does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a busi-

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[1] New York *ex rel*, Pa. R. Co. v. Knight, 192 U. S. 21, 48 L. Ed. 325 (1903), affirming 171 N. Y. 354.

[2] Ewing v. Leavenworth, 226 U. S. 464, 57 L. Ed. 303 (1913); affirming 80 Kan. 58. See also Kansas City, Ft. Scott, Etc., Co. v. Botkin, 240 U. S. 227, 60 L. Ed. 617, affirming 95 Kan. 261.

[3] Osborne v. Florida, 164 U. S. 650, 41 L. Ed. 586 (1896), affirming 33 Fla. 162, 25 L. R. A. 120.

ness which is interstate in its character, and as to the latter kind of business the statute does not apply to or affect it."

While this distinction is clear enough in theory, it is doubtful whether, but for the qualifications hereafter stated, it would not afford an easy method to the State authorities, if so disposed, of evading the prohibition against interference with interstate commerce. Thus a license tax of say $500 per annum for conducting a railroad or telegraph or express office is invalid, if it is not, by its express terms or by the construction of the State court, limited to the privilege of conducting a local business. But if it is so limited, it will be valid. The common carrier cannot confine himself to local business. He must carry on an interstate business as well, and the interstate business must be transacted with the same offices and the same facilities as the local business.[1]

§ 232. **It Must Clearly Appear that Intra-state Business Alone is Taxed.**—The Circuit Court of Appeals, Fourth Circuit, has said[2] that, in the imposition of such a tax, the interstate business must be distinguished from intra-state business or such discrimination must be made possible, so that it may clearly appear that the intra-state business alone is taxed. In this case an ordinance of the City of Alexandria, Virginia, exacted a license from every express company having an office in Alexandria receiving goods and forwarding them to points within the State of Virginia. The court said that this ordinance made no discrim-

[1] Thus the Supreme Court of Nebraska, following Postal Telegraph Cable Co. v. Charleston, held valid an ordinance imposing an occupation tax upon railroads having a depot within the city, and exempting from the levy all interstate commerce of such corporation. City of York v. C. B. & Q. R. Co., 56 Neb. 572. And the Supreme Court of Alabama, City of Anniston v. Southern Railway Co., 112 Ala. 557, held valid an annual license tax of $100 for each main line of railroad to and from other points in the State of Alabama. See also W. U. Tel. Co. v. City of Fremont, 43 Neb. 499, and 26 L. R. A. 706; Knoxville & Ohio R. Co. v. Harris, 99 Tenn. 684.

[2] Webster v. Bell, 68 Fed. 183, 15 C. C. A. 360. See also United States Exp. Co. v. Hemmingway, 39 Fed. 60.

ination between business done without and within the State and such an ordinance was declared invalid under the rule laid down in Postal Telegraph Cable Co. v. Charleston.

A license tax is invalid, even if on its face it purports to charge for intra-state express business only, if its amount is determined by the length of the company's line beyond the State, as it is thus in effect a tax on interstate business.[1] Thus also a license tax on a telegraph company reciting that it is in lieu of an *ad valorem* tax on the property of the company located in the State, but which exceeds the amount which would be levied thereon under the property tax law, and makes the payment of either tax a condition precedent to the company's right to do business in the city, is a State regulation of interstate commerce.[2]

A gross revenue tax exacted from a non-resident express company by Oklahoma laws of 1910 which is in addition to the tax levied and collected upon an *ad valorem* basis upon the property and assets of the corporation equal to such proportion of the specified percentage of its gross receipts from any source whatever, as the portion of its business done for it bears to the whole of its business, could not be construed for the purpose of saving its constitutionality as referring only to the receipts from commerce while within the State.[3]

§ 233. **License Must Not be Condition for Transacting Interstate Business.**—License taxation as commonly understood consists in the payment of a tax for the privilege of conducting a business, which but for such license would be unlawful. A license, as the term implies, is the permission of the State to carry on the business, and the payment of the charge exacted therefor is a condition precedent to the issuance of the license. The State however, in the requirement of a license for the privilege of conducting an *intra*-state business cannot make the payment of the license tax a condition of carrying on the *inter*-state business,

[1] Express Company v. Allen, 39 Fed. 712.

[2] Postal Tel. Cable Co. v. Richmond (Va.), 99 Va. 102.

[3] Meyer v. Wells, Fargo & Co., 223 U. S. 297, 56 L. Ed. 455 (1912); Barrett v. New York, 232 U. S. 415, 58 L. Ed. 483 (1914).

but must leave the enforcement of this tax to the ordinary means devised for the collection of taxes.[1] This principle applies to any form of taxation upon the property employed in interstate commerce. Thus it was held in the case of the Western Union Telegraph Company v. Massachusetts that though the tax imposed was valid, the State could not enforce it by the issuance of an injunction restraining the corporation from prosecuting its business in the State until the taxes were paid.[2]

§ 234. **License or Privilege Tax Must Not Exceed Amount of Tax on Property.**—Another important qualification of the State's power of license taxation of interstate carriers is that the tax when imposed must not exceed the sum which might be levied directly upon their property according to the general property taxation in that State. A license or privilege tax which is graduated according to the amount and value of the property within the State is in substance and effect therefore a property tax. Thus, in a case from Mississippi, a tax thus imposed was declared[3] to be substantially a tax on property merely, not on the privilege of doing an interstate business. The substance and not the shadow determines whether the power has been validly exercised. The court said, page 695:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within the State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the

1 See Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 39 L. Ed. 311 (1895).

2 Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790 (1888).

3 Postal Tel. Cable Co. v. Adams, 155 U. S. 688, *supra.*

amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be levied directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subject to restraint or impediment."[1]

While the court said that a tax thus imposed was not open to objection, it went further and stated that the license would be invalid, if it exacted more than the amount of the tax levied according to the ordinary property taxation. It said, at page 696:

"Doubtless no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."[2]

The principle thus laid down by the court would apply to all license taxation in any locality, whether levied directly by the State or by the municipality acting under State authority. The aggregate tax, in whatever form levied, must not exceed that which would be levied under ordinary property taxation. In

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[1] Justices Brewer and Harlan dissented, saying that it was a tax on the privilege of doing within the limits of the State the business of an interstate carrier of telegraph messages; that it was therefore a regulation of interstate commerce, and that this characteristic of the tax was not affected by the question whether the amount was more or less than it would have been if it had been levied on an *ad valorem* basis.

[2] Citing C. C., Etc., Ry. Co. v. Backus, 154 U. S. 439, 38 L. Ed. 1041 (1894), *infra*, Sec. 455.

other cases the fact that property employed in a business is taxed does not preclude the State from taxing the business at the same time. The rule laid down by the Supreme Court would seem to preclude this form of double taxation upon interstate carriers.

§ 235. **Tax on Interstate Telegraphic Messages Invalid.**—The State of Texas adopted another form of license taxation, by imposing a tax of one cent on every telegraphic message of full rate and one-half cent for every half rate message. The Supreme Court, reversing the Supreme Court of Texas,[1] decided that the law imposing this tax was, as to interstate messages, void, but that it was valid as to business within the State. The decision was placed upon the ground, not only of interference with interstate commerce, but also that the telegraph company, under the Act of Congress, was a government agency, and further that no tax could be levied on messages sent by government officers on the business of the United States.

§ 236. **Privilege Tax on Sleeping Cars.**—Still another form of license or privilege taxation was levied in Tennessee and other States, upon companies leasing sleeping cars, for the privilege of operating them. This privilege tax was held invalid as an interference with interstate commerce, when applied to cars used in the interstate transportation of passengers.[2] The State may however tax the privilege of operating sleeping cars wholly within its limits.[3]

An annual tax of three thousand dollars imposed by a State statute upon sleeping car companies which carried one or more

[1] Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067 (1882).

[2] Pickard v. Pullman Southern Car Co., 117 U. S. 34, 29 L. Ed. 785 (1886), overruling Pullman Southern Car Co. v. Gaines, 3 Tenn. Ch. 587. The court in its opinion in this case distinguished the case of Wiggins Ferry Co. v. East St. Louis, *supra*, by saying that the ferry-boats had a *situs* in the State for taxation and that the exaction of a license fee in respect of them was not a regulation of commerce. See *supra*, Sec. 213.

[3] Gibson County v. Pullman Southern Car Co., 42 Fed. 572. See also opinion of Mr. Justice Matthews in Pullman Southern Car Co. v. Nolan, 52 Fed. 276.

local passengers or cars operated within the State is not void as a burden on interstate commerce where the company is free to decline the local business if it sees fit.[1]

A tax for operating sleeping and palace cars from one point to another within the State can not be deemed an unconstitutional regulation of commerce because of the declaration in the Mississippi Constitution that sleeping cars are common carriers and subject to liability as such. The court said that if the words imposed such an obligation, the tax would be invalid.[2] A tax of five hundred dollars per car on all sleeping cars in Tennessee was held void, but a tax of three thousand dollars on local business held valid.[3]

§ 237. **Compensation Exacted by City for Use of Poles in Streets Not Regulation of Commerce.**—A municipality may exact payment by way of reasonable rental for the occupancy of its streets by the poles of a telegraph company, and this is not a license tax on interstate commerce. Thus an ordinance of the city of St. Louis exacted the sum of five dollars *per annum* for each telegraph pole on the streets of the city. This was declared invalid in the United States Circuit Court as a regulation of commerce, but the Supreme Court, reversing the decision of the Circuit Court, sustained the tax,[4] holding that it was not a privilege or license tax, but was in the nature of a charge for the use of property belonging to the city and could properly be called rental. "A tax," it was said, "is a demand of sovereignty; a toll is a demand of proprietorship." It was said however that the reasonableness of the amount charged for the rental must depend upon circumstances, and the case was remanded for a new trial on that issue.[5]

It has since been decided by the United States Circuit Court,

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[1] Allen v. Pullman Car Co., 191 U. S. 172, 48 L. Ed. 134 (1903).

[2] Pullman Co. v. Adams, 189 U. S. 420, 47 L. Ed. 877 (1903), affirming 78 Miss. 814.

[3] Adams v. Pullman Co., 189 U. S. 429, 47 L. Ed. 419 (1903).

[4] St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 37 L. Ed. 380 (1893). W. U. T. Co. v. New Hope, 187 U. S. 419, 47 L. Ed. 240 (1903).

[5] On retrial in the Circuit Court, the charge was held unreasonable and excessive.

in a case from Philadelphia, that the city had no power to impose upon a telegraph company doing interstate business a tax upon its poles and wires in excess of the reasonable expense to the city for the inspection and regulation thereof.[1] But it was for the jury to determine whether the amount was reasonable, and the city had a right to show that additional expense was incurred by it in consequence of the wires suspended in the streets.[2]

An ordinance imposing a license fee on poles and wires of an interstate telegraph company was held not to be a valid exercise of the police power, where the municipality has made no inspection or incurred any expense for that purpose and the fee is twenty times the amount of any expense that might have been reasonably and fairly incurred to make this inspection, or for any measure of protection required to be taken by the municipality for the safety of the public.[3] The reasonableness of the charge for the municipal license for telegraph poles must be submitted to the jury, where there is testimony that actual cost of maintenance, repairs and supervision by the company was less than one-half the sum charged by the city for supervision alone, and the additional charge of one dollar per mile for underground wires had been removed as an inducement to the removal of all overhead wires.[4]

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[1] Philadelphia v. Western Union Telegraph Co., 82 Fed. 797.

[2] Phila. v. Atlantic & P. Tel. Co., 42 C. C. A. 325, 3rd Circuit, 102 Fed. 254; Philadelphia v. W. U. Tel. Co., 89 Fed. 454; Philadelphia v. Postal Tel. Cable Co., 21 N. Y. Supp. 556; Philadelphia v. W. U. Tel. Co., 40 Fed. 615.

This principle was applied in Ohio, Bogart v. The State (Com. Pl.), 20 Weekly L. Bul. 458, where a vehicle license tax was sustained, which required owners of vehicles to pay an annual license fee, and provided that the fees be placed to the credit of the street repairing department. The court held that this was not an interference with interstate commerce when enforced against non-resident owners, as it was a compensation for the advantages and improved facilities afforded by the city.

[3] Postal Telegraph Co. v. Taylor, 192 U. S. 66, 48 L. Ed. 342 (1904), reversing 202 Pa. 583.

[4] Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 160, 47 L. Ed. 995 (1903).

A city ordinance imposing a license tax on poles and wires of an interstate telegraph company is not a valid exercise of the police power, where the municipality has made no inspection and the license has no relation to any possible expenses.[1]

§ 238. **Payment Reserved as Bonus in Railroad Charter Not Regulation of Commerce.**—A statute of Maryland granted to the Baltimore and Ohio Railroad the right to build a branch from Baltimore to Washington, and to charge not exceeding $2.50 and in proportion for every shorter distance, providing also that the company should pay the State one-fifth of the whole amount received from transportation of passengers every six months. It was claimed that, under the decision of Crandall v. Nevada, *supra,* Sec. 20, this was in effect a tax upon, and an interference with, commerce. The court held,[2] opinion by Bradley, J., that it was not a tax upon commerce, but was rather a *bonus* charged by the State in the charter as a consideration for the grant, and was not repugnant to the Constitution. The State itself could have built the road and charged any rate it chose, and it made no difference, from a Constitutional point of view, that it authorized its citizens to build it and reserved for its own use a portion of the earnings. It was simply the exercise by the State of absolute control over its property and prerogatives. In answer to the suggestion that the public should have a remedy against exorbitant fares and freight exacted by the State lines of transportation, for the bonus would necessarily affect the charge upon the public which the donee of the franchise would be obliged to impose, the court said that the same difficulty is found in exorbitant charges by steamship lines, but that the only remedy is in competition.

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[1] Postal Tel. & Cable Co. v. Taylor, 192 U. S. 74, 48 L. Ed. 342. See also Western Union Tel. Co. v. City of Richmond, 178 Fed. 310, where held that a fee of two dollars per pole per year was in the nature of a special charge for the use of the streets and was reasonable in amount and valid.

[2] Railroad Co. v. Maryland, 21 Wallace 456, 22 L. Ed. 678 (1875). Justice Miller dissented, saying that in his opinion the statute was void under the decision in Crandall v. Nevada, *supra,* Sec. 20.

§ 239. **Taxation of Rolling Stock.**—The taxation of railroad cars, which are continually in transit from State to State, presented a perplexing problem, because it was claimed that they had no taxable *situs* in any of the States wherein they were employed and through which they passed as instruments of interstate commerce. The taxation of the privilege of operating the cars was sought to be enforced for this reason, but was adjudged invalid as a direct interference with interstate commerce.[1] It was claimed that such property had no taxable *situs* except at the terminus of the line, although the cars were continually in transit through that and other States.

The difficulty was finally solved by adopting definitely the principle of taxing the "average number of cars in habitual use" in the State during the year.

§ 240. **Rule of Average of Habitual Use Adopted.** — The subject of the taxation of rolling stock was first considered by the Supreme Court in the case of the Baltimore & Ohio Railroad, where the judgment of the lower court enjoining the sale of certain engines and cars levied upon by a taxing officer of the State of Virginia was affirmed.[2] The court, although holding that the statute of Virginia did not authorize the particular tax sought to be levied, said, p. 123:

"If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation.

[1] See Pickard v. Pullman Southern Car Co., *supra*, Sec. 236.

[2] Marye v. Baltimore & Ohio R. R. Co., 127 U. S. 117, 32 L. Ed. 94 (1888).

of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid."

The principle thus recognized by the court has been applied in a number of cases, particularly with reference to sleeping cars, refrigerator cars and the like, owned by independent companies and leased to railroads.

The State of Pennsylvania imposed a tax on the Pullman Palace Car Company, taking as the basis of the assessment such proportion of the capital of the company as the number of miles of railroad, over which the cars passed in the State of Pennsylvania, bore to the whole number of miles in that and other States over which its cars were run. It was strongly contended that the cars could be taxed only in the State of Illinois, where the car company was organized and had its principal place of business. But the tax was sustained both by the Supreme Court of Pennsylvania[1] and by the Supreme Court of the United States.[2] The latter court said, at p. 22:

"No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in the amount and variety of personal property, not im-

[1] 107 Pennsylvania 156.

[2] Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613 (1881).

mediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used."

§ 241. **Supreme Court on Taxable Situs of Railroad Cars.**—In answer to the argument that the rule ought to be the same as that applicable to vessels, which are only taxable at the home port, the court replied that there is an obvious distinction between the case of vessels, and that of cars which have no fixed *situs* and traverse the land only, continuing at p. 24:

"No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land."

The court said, after reviewing the cases, that this was neither a license nor a privilege tax, nor a tax on the business or occupation, nor yet a tax on, or because of, the transportation or the right of transit of persons or property through the State to other States or countries. It was imposed equally on foreign and domestic companies. A tax on the capital of a corporation, on account of its property within the State, is, in substance and effect, a tax on that property. The court added, with reference to the jurisdiction of the State in taxation, pp. 25, 26:

"The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be

doubted that the State could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the State boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars traveled extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."

And the court concluded, p. 29:

"For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicil, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether."[1]

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[1] Strong dissent was made by Justice Bradley, with whom concurred Justices Field and Harlan. He said, l. c. p. 30:

"Certainly property merely carried through a State cannot be taxed by the State. Such a tax would be a duty—which a State cannot impose. If a drove of cattle is driven through Pennsylvania from Illi-

§ 242. **Taxation of Refrigerator Cars.**—This principle has been followed in other cases. Thus a tax levied on the same basis of the average number in habitual use in the State, was sustained in the case of the cars of the American Refrigerator Transit Company in the State of Colorado. It was claimed that the cars had no *situs* for taxation in the State, because the company was an Iowa corporation and had no office or place of business in Colorado. The average number of cars used in the State was forty. The tax was affirmed both in the State

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nois to New York, for the purpose of being sold in New York, whilst in Pennsylvania it may be subject to the police regulations of the State but it is not subject to taxation there. It is not generally subject to the laws of the State as other property is. So if a train of cars starts at Cincinnati for New York and passes through Pennsylvania, it may be subject to the police regulations of that State whilst within it, but it would be repugnant to the Constitution of the United States to tax it. We have decided this very question in the case of State Freight Tax, 15 Wall, 232, 21 L. Ed. 146 (1873). The point was directly raised and decided that property on its passage through a State in the course of interstate commerce cannot be taxed by the State, because taxation is incidentally regulation, and a State cannot regulate interstate commerce. The same doctrine was recognized in Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715 (1886)."

After reviewing other decisions, he insisted that, although such cars are not to be free from taxation, any more than ships, yet they are not taxable by the States in which they are only transiently present in carrying on their commercial operations. He said at p. 33:

"In the opinion of the court it is suggested that if all the States should adopt as equitable a rule of proportioning the taxes on the Pullman company as that adopted by Pennsylvania, a just system of taxation of the whole capital stock of the company would be the result. Yes, if— ! But Illinois may tax the company on its whole capital stock. Where would be the equity then? This, however, is a consideration that cannot be compared with the question as to the power to tax at all—as to the relative power of the State and general governments over the regulation of internal commerce—as to the right of the States to resume those powers which have been vested in the government of the United States."

See also Pullman's Car Co. v. Hayward, 141 U. S. 36, 35 L. Ed. 621 (1891), sustaining the property tax upon railroad cars levied upon the same principle of the average number in habitual use, the tax being apportioned to the counties of the State on the mileage basis.

court and in the Supreme Court,[1] the latter saying, l. c., p. 81:

"It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed."

§ 243. **Mileage Apportionment in Taxation of Rolling Stock.**—In the application of this rule of average of habitual use to the taxation of sleeping cars and other forms of rolling stock, there was necessarily involved the recognition of the principle of mileage apportionment as between the different States in the railway system. The same principle has been applied in different State systems of taxation of such property. The total assessed value of the average number of cars in habitual use in the State having been ascertained, this amount is apportioned to the different counties or cities along the line of the railroad in the State. This has been held a valid method of taxation, both by the State and Federal courts, see *infra,* Sec. 259 *et seq.*[2]

§ 244. **State Tax on Freight Invalid.**—The taxation of corporations on the basis of their gross receipts, having the ad-

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[1] American Refrigerator Transit Co. v. Hall, 174 U. S. 70; 43 L. Ed. 899 (1899); Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. Ed. 708 (1900), applying the same rule in the case of the taxation of cars of a Kentucky corporation in Utah. See also Pullman's Palace Car Co. v. Twombley, 29 Fed. 658, opinion by Brewer, J., holding valid the Iowa statute; also Board of Assessors v. Pullman's Palace Car Co., 60 Fed. 37, 8 C. C. A. 490.

[2] For decision of a State court holding that cars of the Armour Packing Company have a taxable *situs* only at the domicil of the corporation owning the cars, see State *ex rel.* v. Stephens, 146 Mo. 662.

vantage of simplicity and efficiency and being in effect a corporation income tax, has been adopted in many States with reference to domestic corporations, particularly when engaged in *quasi* public business. The application of this principle to interstate corporations, however, encountered the difficulty, that the taxation of the receipts of interstate commerce is in effect taxing interstate commerce itself, and thus placing the conduct of it under State control.

The difficulty was illustrated in two cases decided in 1872, both from Pennsylvania, one known as the State Freight Tax Case, and the other as the State Tax on Railway Gross Receipts. In the former,[1] a tax was levied by the State of Pennsylvania upon the freight carried by railroads into or from or through the State, at the rate of a definite sum upon each ton of freight, was declared void as an interference with interstate commerce. The court said that commerce, as used in the Constitution, includes not only traffic but intercourse and navigation, and that, if the State could tax a ton of freight at all, it could tax it so heavily as would make interchange of commodities between the States impossible.

§ 245. **State Tax on Railway Gross Receipts.**—In the other case, a tax of three-fourths of one per cent, levied by the State of Pennsylvania upon the gross earnings of every railroad incorporated under its laws and not liable to an income tax under existing laws, was adjudged valid. In that case the tax was resisted by the Philadelphia & Reading Railroad Company, a Pennsylvania corporation whose road lay between Philadelphia and the coal regions of the State. This company claimed that a large source of its profit was derived from the transportation of coal to places from which most of it went to States other than Pennsylvania. But the court said[2] that this case was to be distinguished from that of the State freight tax. It is not everything that affects commerce that amounts to a regulation of it

[1] 15 Wallace 232, *supra*, Justices Swayne and Davis dissenting.

[2] 15 Wallace 284, 21 L. Ed. 164 (1873). Justices Miller, Field and Hunt dissenting.

within the meaning of the Constitution. The States have authority to tax the assets, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property belonging to natural persons, and to the same extent. The court said further, at p. 293:

"We think also that such tax may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise."

The court said that, when the tax was laid upon gross receipts, these receipts had lost their distinctive character as freight by becoming incorporated into the general mass of the company's property, l c., p. 295:

"There certainly is a line which separates that power of the Federal government to regulate commerce among the States, which is exclusive, from the authority of the States to tax persons' property, business, or occupations, within their limits. The line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation."

It seems to have been conceded that a State can levy a tax upon net earnings, and the court said that it is difficult to state any well-founded distinction between a State tax upon net earnings and one upon gross earnings, that net earnings are a part of the gross receipts, and that the gross receipts are a measure of approximate value.

Neither of these cases has been overruled; but the authority of the decision in the case of the State Tax on Gross Receipts was for a time seriously impaired by decisions of the court apparently inconsistent with the broad statement therein of the right to tax gross receipts, on the ground that they have passed

into the treasury of the company and lost their distinctive character as freight.[1]

It will be noticed that the mileage rule of apportionment of interstate properties was not suggested or considered in the case of the State Tax on Gross Receipts. The case presented was that of a railroad whose line was entirely within the State, but which did an interstate business through its connections with other lines leading out of the State.

§ 246. **Mileage Apportionment in Interstate Railway Taxation.**—In a later case, which seems to have been the first case before the Supreme Court involving the taxation of an interstate railroad[2] as such, the court sustained the tax levied by the State of Delaware upon the Philadelphia, Wilmington & Baltimore Railroad Company, a through line connecting the cities of Baltimore and Philadelphia, of which that part in Delaware had been built by a Delaware corporation, which had been consolidated with the corporations in the other States of Pennsylvania and Maryland. The act provided that a tax of one-fourth of one per cent should be levied upon the actual cash value of every share of the capital stock of all railroad and canal companies, provided, however, that, in the case of an interstate railroad, the company should only be required to pay the tax on such part of the shares of its capital stock as should be in that proportion to the whole number of shares, which the length of the road within the State should bear to the whole length. It was claimed that this was an attempted taxation of property beyond the jurisdiction of the State, and that there was no relation between the capital invested and the number of shares of the company owned in the State. But the court replied that the tax was not upon the shares, nor upon the property of the corporation, but a tax upon the corporation, measured by a percentage upon the cash value of a certain proportional part of the shares, and that, although the rule was ar-

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[1] See Steamship Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200 (1887); Fargo v. Michigan, 121 U. S. 230, 30 L. Ed. 888 (1887).

[2] Delaware Railroad Tax, 18 Wallace 206, 21 L. Ed. 888 (1873).

bitrary, it was approximately just, and one which the legislature had the right to adopt. It said, at p. 231:

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

The principle of mileage apportionment has been clearly announced by the Supreme Court as a basis for fixing the value of railroad property within the State for the purposes of taxation.[1]

Interstate commerce is not unconstitutionally interfered with by a franchise tax imposed upon a domestic railroad corporation by the New York laws because no deduction is allowed from the capital stock, taken as the basis of the tax, on account of a considerable proportion of its rolling stock which by the ordinary course of the railway business is always absent from the State.[2]

§ 247. **Taxation of Net Earnings Sustained.** — A tax of three per cent was also levied under this act upon the net earnings of the company, or the income received from all sources during the preceding year, and this also was adjusted on the mileage rule, such shares only of the net earnings being subject to the tax as were in the proportion to the whole net earnings which the length of the road within the State bore to the whole length. As to this the court said, p. 231:

"Nothing was urged in the argument specially against the tax upon the corporation under the first section of the act, which is determined by the net earnings or income of the company. Whatever objections could be presented were answered by the observations already made upon the tax under the other

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[1] C. B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. Ed. 636 (1907). See also St. Louis, I. M. & S. R. Co. v. Davis, 122 Fed. 639. See also cases cited in Ch. VIII, *infra*.

[2] New York *ex rel.* v. Miller, 202 U. S. 584, 50 L. Ed. 1155 (1906), affirming 177 N. Y. 584.

section. A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed."

§ 248. **Tax on Gross Earnings Held Invalid.**—A series of cases followed which held State taxes levied upon gross earnings of transportation and telegraph companies invalid. These cases did not expressly overrule the case of the State Tax on Gross Receipts, *supra,* Sec. 245, but seem clearly inconsistent with the principle on which it was based, that the receipts from freight could be taxed, while the freight itself could not be taxed. This distinction was directly denied.

Thus, in 1887, an act of Pennsylvania imposing a tax upon the gross receipts of railroad, canal, steamboat and other transportation companies was held invalid as to a steamship company, a Pennsylvania corporation, operating steamers between the ports of Philadelphia and Savannah and in foreign trade out of New Orleans.[1] The court after holding that the interstate commerce carried on by ships on the sea is national in its character admitting of only one uniform system, said, Justice Bradley delivering the unanimous opinion, at p. 336:

"If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

The court commented at length upon the cases of the State Freight Tax and the State Tax on Railway Gross Receipts, *supra,* Sec. 244 *et seq.,* and said that if the former stood alone

[1] Philadelphia Steamship Co. v. Pennsylvania, 122 U. S. 326, *supra.*

it would control this case. It was said further that the first ground on which the decision of the State Tax on Gross Receipts was placed was not tenable, that is, that the receipts from freight had been collected into the treasury of the company and were no longer distinguishable as receipts. The opinion proceeds, at p. 342:

"No doubt a ship-owner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable; that it is not supported by anything decided in Brown v. Maryland; but, on the contrary, that the reasoning in that case is decidedly against it."

It was intimated, however, that the decision in the Railway Gross Receipts Case could be based upon the second ground stated in the opinion therein, to-wit, that it was a tax on the franchise of the corporation. But that consideration was inapplicable to the case of the steamship company. The court declared that the tax was not an income tax, as it was not levied on the incomes of all the inhabitants of the State, but was a special tax levied on the transportation companies.

At the previous term, the court had held invalid a tax levied by the State of Michigan upon the gross receipts of the Merchants Dispatch Transportation Company.[1] The cars in that case were owned by the transportation company and leased to the railroads, which operated them. The company was a New York corporation, and the tax finally assessed against it was for

[1] Fargo v. Michigan, 121 U. S. 230, *supra.*

the gross receipts, which it had returned as the money received from the transportation of freight from points without to points within the State, and from points within to points without. No tax was levied upon the amount received for transportation passing entirely through the State to and from without. The court said there was nothing in the statute on which to base this distinction, and therefore it must have been made upon some idea of the authorities of the State that the one was interstate commerce and the other was not, which the court was at a loss to comprehend, as there was no such difference. It would seem from the statement of facts that the tax was apportioned according to the mileage in the State; but this was not pressed by counsel nor considered by the court. The opinion was by Justice Miller, who had dissented from the decision in the State Tax on Railway Gross Receipts Case, on which the Supreme Court of Michigan had relied in sustaining this tax. He distinguished that case, first because the subject of taxation there was a Pennsylvania corporation having the *situs* of its business within the State; and secondly, upon the ground that the assessment there was upon money in the treasury of the company, while in the case at bar the money received for freight probably never was within the State, being paid to the company either at the beginning or end of its route.

In 1888 a tax levied by Ohio upon the gross receipts of the Western Union Telegraph Company was held valid as to the receipts from business within the State, but invalid as to those from interstate business, and the court therefore sustained an injunction against the collection of taxes upon the latter.[1] In this case moreover there seems to have been no effort to apportion the receipts according to the mileage in the State, and the tax was directly upon the receipts in Ohio of the company's business, and not upon the gross receipts of all its business. The court, in its opinion, refers to the fact that at the same term it had sustained a tax levied by the State of Massachusetts upon

[1] Ratterman v. Western Union Tel. Co., 127 U. S. 411, 32 L. Ed. 229 (1888); Western Union Telegraph Co. v. Alabama, 132 U. S. 472, 33 L. Ed. 409 (1890).

the capital stock of the company, the ratio allotted being the ratio of the mileage in the State to the total number of miles of the company's lines in the United States.[1]

§ 249. **Tax on Gross Receipts Held Invalid in State Courts.**—These cases were considered as impairing the authority of the State Tax on Gross Receipts Case, and the State courts followed in holding that method of taxation unconstitutional, as to that part of the receipts coming from interstate commerce.

Thus the Supreme Court of Vermont[2] admitted that the effect of the decision in Philadelphia Steamship Co. v. Pennsylvania, *supra,* Sec. 248, was to overrule the State Tax on Gross Receipts Case and make the law of Vermont taxing gross receipts unconstitutional as to those derived from interstate commerce, saying:

"We as judges of a State court are bound by the very language of the Federal Constitution to accept the construction of any part of that Constitution made by the Supreme Court; and in this case the reasoning of that court seems to us to be entirely unanswerable. We hold, therefore, that our corporation tax law, so far as it seeks to tax the earnings derived from interstate commerce, is unconstitutional, as it interferes with commerce, the regulation of which is within the exclusive control of Congress."[3]

§ 250. **Maine v. Grand Trunk R. R. Co.**—But, a few years later, in 1891, the right of a State to levy a tax upon that portion of all the gross earnings of an interstate railroad appor-

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[1] Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790 (1888), *infra,* Sec. 269.

[2] Vermont & Canada R. R. Co. v. Vermont Central R. R. Co., 63 Vt. 1, 10 L. R. A. 565.

[3] The court, however, held that the lessee of a railroad could not be compelled to pay to the lessor the amount of such tax thus adjudged unconstitutional which it had paid to the State under its covenant to pay taxes and accordingly withheld from its rent, although notified by the lessor not to pay them, as the taxes when paid were lawful. On appeal the Supreme Court dismissed the case for the want of jurisdiction, 159 U. S. 639, 40 L. Ed. 284 (1895), no Federal question being involved as between the parties.

tioned to the total earnings, as the mileage in the State is proportioned to the total mileage, when levied as an excise or franchise tax upon the corporation, was distinctly sustained by the Supreme Court.[1] Such a tax was levied by the State of Maine upon the Grand Trunk Railroad Company, a Canada corporation, which had leased a railroad in Maine and operated it and used its franchises under legislative permission. Under the statute the lessee was required to pay annually what was entitled an excise tax for the privilege of exercising its franchise in the State. The amount of this tax was calculated upon the gross receipts for the preceding year on the mileage basis. The gross receipts of the whole system within and without the State were divided by the total number of miles operated, and, the average gross receipts per mile having been thus obtained, this amount was multiplied by the number of miles in Maine and the tax computed upon the result. The case was submitted to the court upon the distinct issue of the right of the State to levy such a tax. The U. S. Circuit Court had held the tax invalid on the ground that the State Tax on Gross Receipts Case had been overruled.[2]

The opinion was delivered by Justice Field, reversing the court below and holding the tax valid. He said, pp. 227 and 228:

§ 251. **Tax on Gross Earnings, Apportioned by Mileage, Valid as Excise Tax.**—"The tax for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of a State to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings or to deal in special commodi-

[1] Maine v. Grand Trunk R. R. Co., 142 U. S. 217, 35 L. Ed. 994 (1891).

[2] The reported brief of Mr. Littlefield, Attorney-General, contains a clear analysis of the cases theretofore decided and the issue submitted to the court.

ties, or to exercise particular franchises.[1] It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed."

The opinion further said that the Circuit Court erred in holding that the tax was upon the receipts as such, and therefore an interference with interstate and foreign commerce. The resort to the receipts was simply to ascertain the value of the business done by the company; and the effect was the same as if the reference had been to results of former years. There was no levy, by the statute, on the receipts themselves, either in form or fact, as they constituted simply the means of ascertaining the value of the privilege conferred.

The court also said that the case of the Philadelphia Steamship Co. v. Pennsylvania[2] in no way conflicted with that decision.[3]

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[1] For construction of the term "excise" in Federal taxation see *infra*, Sec. 560.

[2] *Supra*, Sec. 248.

[3] Four judges concurred with Justice Field in this opinion, Chief Justice Fuller, and Justices Gray, Blatchford and Brewer, while four

§ 252. **Principle Reaffirmed.**—The principle thus established, that the gross receipts of an interstate carrier may be taxed by the State when the tax is levied as an excise or franchise tax, and apportioned on the basis of the mileage within the State to the total mileage, has been distinctly reaffirmed.[1]

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judges dissented, Justices Bradley, Harlan, Lamar and Brown. The dissenting opinion by Justice Bradley was the last reported opinion of that distinguished jurist. In it he said: "This court and some of the State courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter; for its franchises; for the privilege of carrying on its business; it may be taxed on its capital; and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further. This court held that the taxation of the capital stock of the Western Union Telegraph Company in Massachusetts, graduated according to the mileage of lines in that State compared with the lines in all the States, was nothing but a taxation upon the property of the company; yet it was in terms a tax upon its capital stock, and might as well have been a tax upon its gross receipts. By the present decision it is held that taxation may be imposed upon the gross receipts of the company for the exercise of its franchise within the State, if graduated according to the number of miles that the road runs in the State. Then it comes to this: A State may tax a railroad company upon its gross receipts in proportion to the number of miles run within the State, as a tax on its property; and may also lay a tax upon these same gross receipts, in proportion to the same number of miles, for the privilege of exercising its franchise in the State! I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct."

[1] New York, Lake Erie and Western R. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. Ed. 1046 (1895); Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. Ed. 672 (1892). In the latter case the tax was upon the gross receipts, but it was held that the railroad running between two points in Pennsylvania and traversing only a short distance in New Jersey was not engaged in interstate commerce, because the incidental passage through another State in a continuous carriage from one point in a State to another point in the same State is not interstate commerce.

Thus the court in Erie R. R. Co. v. Pennsylvania reaffirmed the case of Maine v. Grand Trunk Railway and sustained a tax of Pennsylvania which it was claimed was improperly levied upon tolls received by a New York railroad company from other railroad companies for the use by them of so much of its railroad tracks as lay in the State of Pennsylvania. It is said, at page 438:

"The tax complained of is not laid on the transportation of the subjects of interstate commerce, or on receipts derived therefrom, or on the occupation or business of carrying it on. It is a tax laid upon the corporation or business of carrying it on. It is a tax laid upon the corporation on account of its property in a railroad, and which tax is measured by a reference to the tolls received. The State has not sought to interfere with the agreement between the contracting parties in the matter of establishing the tolls. Their power to fix the terms upon which the one company may grant to the other the right to use its road is not denied or in any way controlled.

"It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burden on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."[1]

§ 253. **Immaterial Whether Corporation is Domestic or Foreign.**—In the case of Maine v. Grand Trunk Railway Company, the defendant was a foreign corporation organized under the laws of Canada, but its railroad in Maine had been constructed by another corporation under a Maine charter, and was operated by defendant under lease. The decision of the court however, was not based upon any distinction between the *status* of a domestic and that of a foreign corporation. It said that the granting of the privilege to operate in the State as a corporation, whether the corporation be of domestic or foreign origin, rests entirely within the discretion of the State. Obviously this ex-

[1] See Cumberland & Penn. R. R. Co. v. Maryland, 92 Md. 668, and 52 L. R. A. 764, following Maine v. Grand Trunk R. R. Co., and carefully reviewing the decisions of the Supreme Court.

pression was used in the sense, not that the State can prohibit the corporation engaged in interstate commerce from operating in the State, but that, whether the corporation be domestic or foreign, the State has the right to tax the corporate franchise upon the basis of an apportionment to the receipts of the business.

The rule as laid down therefore in Maine v. Grand Trunk Railroad Company, *supra*, Sec. 250, would seem to be equally applicable to foreign and domestic corporations. The difference between foreign and domestic corporations was discussed in Fargo v. Michigan, *supra*, Sec. 248, as constituting the distinction between that case, which involved a foreign corporation, and the case of the State Tax on Gross Receipts, in which the corporation was domestic.[1]

§ 254. **A Tax on Gross Earnings When an Interference With Interstate Commerce.**—A tax levied by Texas upon railroad companies when the lines were wholly within the State, equal to one per centum of their gross receipts where, in some parts, much the larger parts of these gross receipts is derived from the carriage of passengers or freight coming through or destined to points without the State, was adjudged an unlawful interference with interstate commerce.[2]

It seems from the opinion in this case that the tax was in addition to a tax on the property of the railroad, that is, upon the valuation of the property taken as a going concern; so that it was in effect double taxation.

Under the same reasoning the gross earnings tax levied by Oklahoma was adjudged invalid. In this case also the tax was

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[1] In Tide Water Pipe Co. v. Assessors, 57 N. J. L. 516, the rule was applied in sustaining a tax upon part of the gross receipts of a foreign pipe line company proportioned to the mileage in the State, the tax being levied as a franchise tax for the privilege of doing business in the State.

[2] Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, 52 L. Ed. 1031, reversing 97 S. W. 71 (1908), Chief Justice Fuller and Justices Harlan, White and McKenna dissenting.

in addition to the taxes levied and collected upon an *ad valorem* basis on the property—that is three per centum of the gross receipts paid by express companies.[1]

The court said that there was no warrant for calling this tax a property tax, and that it was essentially the same as the tax held bad in the Texas case. The tax was not an attempt to reach the value of the property of the company, but was in addition to an *ad valorem* tax upon the property, and therefore an interference with interstate commerce.

At the same term at which the Oklahoma case was decided, the court sustained the validity of the Minnesota tax upon gross earnings.[2]

In this case, the court, adopting the construction of the Act made by the Supreme Court of the State, found that this tax of six per cent upon the gross receipts, was in lieu of all taxes upon the property of the company; in other words, was the only mode prescribed by the law for exercising the recognized authority of the State to tax the property of the express companies as going concerns within its jurisdiction.

The court said it differed therein from the taxes condemned in the Texas and Oklahoma cases, which were in addition to all other State taxation, reaching the property of the companies.

A tax in Ohio of four per cent upon gross earnings, excluding all interstate earnings from the computation, was sustained as an excise tax for the privilege of conducting a corporate business in the State in addition to an *ad valorem* tax on property.[3]

These cases further illustrate the principle already considered, *supra,* Sec. 199, involving the relation to interstate commerce of the right of the State to levy a tax, even supplemental to a general property tax, when not unreasonable in amount,

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[1] Meyer v. Wells Fargo & Co., 223 U. S. 298, 56 L. Ed. 445 (1912).

[2] U. S. Express Co. v. Minnesota, 223 U. S. 235, 56 L. Ed. 459 (1912), affirming 114 Minn. 346. See also Wisconsin and Michigan Ry. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229 (1903).

[3] Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 737 (1914), affirming 203 Fed. 537.

for the privilege of conducting a corporate business in the State whether by a domestic or foreign corporation.

Such a corporation tax, while not leviable upon gross earnings as such, may be based upon the value of the corporation's property or stock as determined by its gross earnings within the State, when such a tax is levied in lieu of other taxation as in the Minnesota case, it is clearly valid; when rate is not unreasonable and where supplemental to a general property tax as in other States, it must be reasonable in amount so as not to constitute an interference with interstate commerce in a case of interstate carriers, and what constitutes reasonableness must of course be determined upon the facts of the case.

§ 255. **Tax Not Upon Receipts as Such, but Excise Tax Apportioned to Receipts.**—The decisions, *supra*, Sec. 248, holding that a tax cannot be levied upon gross receipts as such have not been overruled in terms and it would seem that, though the distinction seems one more in name than in substance, the tax must be levied as an *excise* tax apportioned to receipts and not directly upon receipts.

The question does not seem to have been raised or considered, in relation to a tax upon earnings, whether the railroad company would be allowed to show in any particular case that the operation of the mileage rule of apportionment would work injustice by enabling the State to tax an undue proportion of earnings. Such a case might well occur where the portion of a company's line in one State traversing a very populous district would be far more productive of earnings than the same mileage in another State. As will be seen hereafter, this consideration has been recognized by the courts with reference to the mileage rule of apportionment in property valuation.

§ 256. **State Tax on Net Receipts.**—The same considerations that are applicable to a tax upon gross receipts apply to one levied upon net receipts. The latter, being the proceeds from the treasury of the corporation after paying all expenses of management and operation, are clearly distinguishable from transportation receipts, even if gross receipts are not, and this

seems to have been conceded in the cases wherein that distinction was discussed.[1] Either gross receipts or net receipts may therefore in the discretion of the State be taken as the basis for calculating the value of the privilege granted the corporation under its statutes, when the State seeks to determine the amount of an excise tax to be paid therefor by the corporation, whether domestic or foreign. This privilege, it should be remembered, is not that of transporting interstate commerce as such, but that of operating as a corporation under the laws of the State.

§ 257. **Valuation of Property by Capitalization of Receipts.**—The right to tax receipts, whether gross or net, must be distinguished from using the receipts or income of the corporation by capitalizing the same as a means of determining the valuation of the property tax. It is the same distinction that there is between levying a tax upon the rental and upon the value of the property from which the rental is paid, determining the valuation of the property by capitalizing the rental.[2]

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[1] See opinion in State Tax on Railway Gross Receipts, *supra*, Sec. 245; also Delaware Railroad Tax, *supra*, Sec. 246.

[2] See *infra*, Sec. 547.

CHAPTER VIII.

VALUATION OF INTERSTATE PROPERTIES FOR TAXATION.

§ 258. Right of property taxation conceded.
259. Unit rule.
260. Illinois railroad cases.
261. Supreme Court on *situs* of railroad property.
262. Supreme Court on apportionment.
263. Application of unit rule to interstate railroads.
264. Supreme Court on mileage apportionment in interstate railroads.
265. Exceptional circumstances may make mileage rule inapplicable.
266. Rulings on testimony not reviewed in Supreme Court unless bearing on Federal question.
267. Entire property may be considered in valuation of portion within State.
268. Value of property in use may be considered in valuation.
269. Unit and mileage rule as applied to taxation of telegraph companies.
270. Value of property outside State to be considered in valuation under mileage apportionment.
271. Unit rule applied to express companies.
272. Ohio express company cases.
273. Special circumstances requiring deduction must be shown.
274. Rehearing of express company cases denied.
275. The enforcement of mileage apportionment.
276. Kentucky express company case.
277. Power of State in valuing interstate properties as defined by Supreme Court.
278. Evidence of inapplicability of mileage rule admissible.
279. Stock market quotations as evidence of value.
280. Presumption that all evidence submitted was considered in valuation.

§ 258. **Right of Property Taxation Conceded.**—The difficulty in adjusting a tax rate on earnings so as to secure equality of taxation under a system of general property taxation has led in many States to an adoption of the system of taxing inter-

state properties by an *ad valorem* property valuation.[1] It has been uniformly declared that while the States cannot interfere by taxation or otherwise with the conduct of interstate commerce or tax the privilege as such of conducting such commerce, they can tax the property employed therein in the State on the same basis that they tax other property. No question can arise therefore as to the power of the State to tax the tangible property in its jurisdiction of a railroad, telegraph or other company engaged in interstate commerce. Thus the roadbeds and station houses of a railroad, the telegraph poles, wires and offices of a telegraph company, the express wagons and delivery offices of an express company may all be assessed like other property of the same class and subject to the same taxation.

The difficulty however, has been found in determining what portion of the intangible property of such interstate corporation can be located within the State so as to be subject to its taxing power.

§ 259. **Unit Rule.**—Before the question was presented to the Supreme Court in relation to the taxation of interstate properties, it had arisen in some of the States in reference to the taxation of such properties within the State. There was established in some of the States, with reference to the valuation of intrastate railroads, the so-called unit rule or rule of entirety, to-wit, the valuation of a railroad in a State for taxation as an entirety and the apportionment of the entire value thus ascertained to the different counties and municipalities in the State traversed by the railroad, according to the proportionate mileage therein. This so-called unit rule is in fact therefore provided for the valuation of such properties by the central power of the entire State, in place of local valuation of that part of the railroad or telegraph system in each county by the officials thereof. This system was established about the same time in both Missouri and Illinois and was sustained by the State courts

[1] In Michigan, by constitutional amendment, the property taxation of railroads was adopted in place of taxation upon gross earnings. Other States, as Minnesota (see *infra*, appendix), have recently adopted the gross earnings tax upon railroads.

of both States. The system of unit valuation, particularly the mileage apportionment, was strongly opposed on the ground that it discriminated against such localities as large cities, where terminal systems were of great value as compared with the same mileage of roadbed in a thinly populated county, but it was held that it was competent for the legislature to adopt that method of apportionment, both as to the roadbed and rolling stock of a railroad.[1]

§ 260. **Illinois Railroad Cases.**—The Illinois system of unit valuation and mileage apportionment within the State, there being apparently no question as to the valuation of interstate properties, was considered by the Supreme Court on appeal from the United States Circuit Court in what are known as the State Railroad Tax Cases, in 1875.[2] It seems that when the opinion was delivered, the points raised in the case had already been decided in favor of the State by the Supreme Court of Illinois, and it was said in the opinion that, as the whole matter concerned the validity of State law, which was not seriously questioned on the ground of any conflict with the Constitution of the United States, the decision of the State court was to be accepted as the rule of decision.[3] The court however, discussed the system enforced by the State Board of Equalization, charged with the duty of valuing the railroad property, and the judgment of the Circuit Court enjoining the collection of the tax was reversed.

It seems that, according to the Illinois rule, the local tangible property of the companies, other than their road-bed and rolling stock, was assessed in the county or city where located, like other property, by the local authorities; while the railroad track, rolling stock and other property not local and the franchises of the company were treated as a unit for taxation, and the valuation thereof, when ascertained, was distributed among

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[1] See State *ex rel.* v. Severance, 55 Mo. 378; Porter v. Railroad Co., 76 Ill. 561. See also Kentucky R. R. Case, 115 U. S. 331, 29 L. Ed. 416 (1886).

[2] 92 U. S. 575, 23 L. Ed. 663 (1876).

[3] 92 U. S. 617, 23 L. Ed. 674 (1876).

the counties through which the road passed, according to the mileage apportionment. The board adopted rules of valuation as follows, l. c. page 587:

"First. The market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses), shall be combined or added together; and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

"Second. From the aggregate amount ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations (such equalized or assessed valuation being taken, in each case, as the same may be determined by the equalization or assessment of property by this board); and the amount remaining in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this State."

The court said, opinion by Justice Miller, as to this method of valuation, that the value of railroad bonds in the market is one of the truest criteria, as far as it goes, of the value of the road as a security for the payment of those bonds. Justice Miller proceeded, l. c., p. 605:

"It is therefore obvious, that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."[1]

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[1] But held in Pullman's Palace Car Co. v. Transportation Co., 171 U. S. 138, 43 L. Ed. 108 (1898), that the market value of stock of a manufacturing company is not a proper measure of the value of the property in accounting for the value thereof, as other considerations speculative and otherwise, not affecting the value of the property,

He added that this would be perhaps the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt, but that this was not the case. The system adopted by the statute of Illinois and the rule of the board preserved the principle of taxing all the tangible property at its value, and then taxing the capital stock and franchise at their value if there was any, after deducting the value of the tangible property.

§ 261. **Supreme Court on Situs of Railroad Property.**—In answer to the objection that the personal property had a *situs* at the principal place of business of the corporation and should be taxed there, the court said, p. 607:

"This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicil of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it; and when it is called into operation as to property located in one State, and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases. Green v. Van Buskirk, 5 Wall. 312. Like all other laws of a State, it is, therefore, subject to legislative repeal, modification, or limitation, and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation."

Objection was made to the assessment of the value as a unit and the distribution according to mileage, and it was said by the court:

§ 262. **Supreme Court on Apportionment.**—"This, it is said, works injustice both to the countries and to the companies. To the counties and cities, by depriving them

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may enter into the market value of the shares. See also Railroad and Telephone Companies v. State Board of Equalizers of Tennessee, 85 Fed. 302, where it was said that notwithstanding anything that may be said in the judicial decisions and legislative enactments, "no more uncertain or delusive element in the attempt to fix values was ever resorted to than this stock and bond basis."

of the benefit of this value as a basis of local taxation; to the company, by subjecting its track and franchises, on the basis of this general value, to the taxation of the counties and towns, varying, as they do, in rate, without the benefit of the rule of assessment which prevails in those counties in the valuation of other and similar property. But, as we have already said, a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track as a whole each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised, than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

§ 263. **Application of Unit Rule to Interstate Railroads.**— About ten years later, in the Kentucky Railroad Tax Cases,[1] the Kentucky statute for the valuation of railroad property by a State board under the mileage rule of apportionment of interstate property was sustained as not violating the Fourteenth Amendment. But apparently the question was not raised, whether the State's valuation of property outside of its jurisdiction constituted interference with interstate commerce.

The application of these principles to the valuation by a State board of interstate railroads was presented to the court nearly twenty years after the decision of the State Railroad Tax Cases in the Indiana Railroad Cases,[2] where the subject was very

[1] 115 U. S. 321, 29 L. Ed. 414 (1886).

[2] Pittsburg, Etc., R. R. Co. v. Backus, 154 U. S. 421, 38 L. Ed. 1031 (1894), and C. C. C. & St. Louis R. R. Co. v. Backus, 154 U. S. 439, 38 L. Ed. 1041 (1894).

fully considered. The Indiana statute of 1891 provided for the assessment of railroad property by a State board, which should act upon the reports of the railroad companies showing the length of track in each county, the total amount of rolling stock, the capital stock, market value, and so on.

The court said that it was concluded by the decision of the Supreme Court of Indiana, that the method of assessment was authorized by the constitution of that State, and the validity of the statute under the Federal Constitution was really established by its own decisions in the State Railroad Tax Cases and Kentucky Railroad Tax Cases, *supra*. It was strongly contended that the statute permitted and required the assessment and valuation of property outside of the State, and this argument was based upon the requirement that a statement of the amount of the capital stock and the indebtedness of the railroad should be returned to the State Auditor. But the court held that the board had a right to this information for determining the value of the property within the State, saying, page 430:

§ 264. **Supreme Court on Mileage Apportionment in Interstate Railroads.**—"When a road runs through two States, it is, as seen, helpful in determining the value of that part within one State to know the value of the road as a whole. It is not stated in this statute, that when the value of a road running in two States is ascertained, the value of that in the State of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the State board. Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road, which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair."

§ 265. **Exceptional Circumstances May Make Mileage Rule Inapplicable.**—The same difficulty which was suggested in relation to the mileage rule of apportionment within a State applies in a greater degree to that rule, as applied to an interstate road. It was admitted by the Supreme Court in these

Indiana cases that exceptional circumstances may exist, and it is right that an assessing board should consider them; but it will be presumed that, if evidence of such circumstances was offered, it was taken into account, and that the board gave due weight to it before finally fixing the assessed valuation of the property within the State. Thus it was said in one of the cases, at page 431:

"It is true, there may be exceptional cases, and the testimony offered on the trial of this case in the Circuit Court tends to show that the plaintiff's road is one of such exceptional cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the State board, it must be assumed, in the absence of anything to the contrary that such board, in making the assessment of track and rolling stock within the State, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not require that the valuation of the property within the State shall be absolutely determined upon a mileage basis.

"Our conclusion, therefore, is that this act is not obnoxious to any of the constitutional objections made to it."

In this case the court sustained the assessment, although admitting that "a shadow had been cast upon the action of the board," in that the valuation had been increased from $8,538,053.00 in 1890 to $22,666,470.00 in 1891.

§ 266. **Rulings on Testimony Not Reviewed in Supreme Court Unless Bearing on Federal Question.** — In another of the Indiana Railroad Tax Cases a special effort was made to show that the State Board had included in its assessment the value of property outside of the State, and that the valuation placed upon the property in the State was largely upon interstate business done by the plaintiff, thus, it was claimed, placing a direct

burden upon interstate commerce. It appeared that the trial court had ruled out the testimony offered as to the elements the members of the board considered in making their valuation, but there was evidence that no franchise belonging to the plaintiff was estimated in making the assessment. The Supreme Court, Justice Brewer delivering the opinion, said, at page 443, that it is not within the province of the court to review any question as to the admission or rejection of testimony, which does not bear directly upon some matter of a Federal nature, and that, under the record, the inquiry was narrowed to these two matters, saying:

§ 267. **Entire Property May be Considered in Valuation of Portion Within State.**—"First, if an assessing board, seeking to assess for purposes of taxation a part of a road within a State, the other part of which is in an adjoining State, ascertains the value of the whole line as a single property and then determines the value of that within the State, upon the mileage basis, is that a valuation of property outside of the State, and must the assessing board, in order to keep within the limits of State jurisdiction, treat the part of the road within the State as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it, if operated separately from the balance of the road? Second. Where an assessing board is charged with the duty of valuing a certain number of lines of railroad within a State, forming part of a line of road running into another State, and assesses those miles of road at their actual cash value determined on a mileage basis, is this placing a burden upon interstate commerce, beyond the power of the State, simply because the value of that railroad as a whole is created partly—and perhaps largely—by the interstate commerce which it is doing?"

"With regard to the first question, it is assumed that no special circumstances exist to distinguish between the conditions in the two States, such as terminal facilities of enormous value in one and not in the other. With this assumption the first question must be answered in the negative. The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent

operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole."

The court illustrated this increase of value from combination by showing the effect of the New York Central Consolidation, where it was observed that the value of the property immediately upon the consolidation was recognized in the market as largely in excess of the value of the separate properties. It was unnecessary to inquire into the cause of this increase in value. It was enough to notice the fact. The State was entitled to tax its proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. The opinion continued:

"The question is, how can equity be secured between the States, and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the State."

"The second question must also be answered in the negative. It has been again and again said by this court that while no State could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce."

§ 268. **Value of Property in Use May be Considered in Valuation.**—As to the basis of property taxation, it was said, page 445:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and deter-

mine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana, and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the State. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt."

The court added:—

"It is enough for the State that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by State laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the State."[1]

§ 269. **Unit and Mileage Rule as Applied to Taxation of Telegraph Companies.**—In two successive cases from Massachusetts and one from Indiana,[2] the Supreme Court sustained the taxation of the Western Union Telegraph Company under the mileage rule of apportionment, that is, by taking as a basis of assessment such portion of the total capital stock of the company, as equaled the ratio of the company's mileage within the State to its total mileage. It was strongly contended that telegraph companies are government agencies and so not taxable by

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[1] Justice Harlan, with whom concurred Justice Brown, dissented in these cases, saying that the statute as construed by the Supreme Court of the State imposed illegal burdens upon interstate commerce, under the guise of valuation for purposes of taxation of property within the State. The board had no authority to impart to the railroad track and rolling stock within the State any part of the value of the company's various interests and property without the State.

[2] W. U. Telegraph Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790 (1886); Massachusetts v. W. U. Tel. Co., 141 U. S. 40, 35 L. Ed. 628 (1891); W. U. Telegraph Co. v. Taggart, 163 U. S. 1, 41 L. Ed. 49 (1896). The principles of these cases were followed and applied in State *ex rel.* v. Western Union Tel. Co., 165 Mo. 502, where the proportion of the franchise exercised in the State was held taxable by adding the proportional part of the value of the franchise to the value of the property located in the State.

State authority, and that therefore such portion of the Western Union lines as was located on roads declared post roads by Congress was exempt. But the court said in the case first cited, page 549, that, if this principle were sound, every railroad in the country would be exempt from taxation because they had all been declared to be post roads, and the same reasoning would apply to every bridge and navigable stream throughout the land. It was held therefore that the Act of Congress, *supra*, Sec. 227, granted to the telegraph company no right of exemption from taxation of its property located in the State, and that this method of mileage apportionment was a reasonable and just method of determining the value of its line within the State.

§ 270. **Value of Property Outside State to be Considered in Valuation Under Mileage Apportionment.**—It was strongly contended in the case last cited from Massachusetts and also in the case from Indiana, that the company was entitled to a deduction from the valuation as fixed, on account of property located in other States and taxable under the laws of such States and also on account of property exempt from taxation.

In W. U. Tel. Co. v. Taggart, the court, referring to the prior decision in regard to the same company, said at page 18:

"Those decisions clearly establish that a statute of a State, requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other States; unless there is something more, showing that the system of taxation adopted is oppressive and unconstitutional."

The law of Indiana provided that the company should return a statement of its whole capital stock, the par value of its shares and their market value, or if they had no market value, their actual value, its real estate and other property in

the State subject to local taxation, its real estate outside of the State and not directly used in the conduct of its business and the sums at which such real estate was assesses for local taxation, the mortgages upon the whole or any part of its line, and the whole length of its line and the length within the State and each county and township of the State. From these statements and such other information as it might have or obtain, the board of tax commissioners was directed to value and assess the property by ascertaining the true cash value of its entire property, for that purpose taking the aggregate value of its shares, if they had a market value, or, if they had none, the actual value thereof. Then, for the purpose of ascertaining the true cash value of the property within the State, after deducting property taxable locally, the proportion of the whole aggregate value of the property was computed on a mileage basis. This act had been construed by the Supreme Court of the State[1] as simply providing for the valuation of the property in the State, and that, if it was shown that for any reason the larger proportional values existed outside the State, then deductions should be made therefor.

Demurrer was sustained to the bill of complaint of the telegraph company, and this ruling was affirmed by the Supreme Court of the State, and, on writ of error, by the Supreme Court of the United States. The latter court said that it would be presumed, in the absence of evidence to the contrary, that the State board had deducted from the total valuation of all the interstate property such value, if any, of extra-state property as would leave the remaining property within and without the State, as near as might be of equal proportional value. It was claimed in the bill of complaint that the price obtained for a few of the shares in the New York Stock Exchange did not fairly represent the actual value of plaintiff's property; and that any price at which any shares might be sold by holders thereof, whether calculated upon any market value or upon actual value, included a consideration of the plaintiff's franchises, contracts, past and probable future earnings, the skill and enterprise of its

[1] 141 Ind. 281.

managers and real estate of great value in Indiana or elsewhere, all of which were blended so as to render it impossible to separate and disintegrate the portions of value applicable to each and any of said elements of value in its shares. The court said, at page 30, that this was hardly more than an argument to show the difficulty of ascertaining the actual cash value of plaintiff's property in the State of Indiana. "It certainly has no tendency to show that the tax commissioners did not, as they were required to do by the statute as since construed by the Supreme Court of the State, assess the plaintiff's property in Indiana at its true cash value according to their best knowledge and judgment, and after making all proper deductions, on account of larger proportional values of its property and business outside the State, or for any other reason."

§ 271. **Unit Rule Applied to Express Companies.** — The most signal and closely contested applications of the unit rule with mileage apportionment were in the taxation of the Adams Express Company, under the so-called Nichols Law of Ohio and under a similar law of Kentucky.

The Nichols Law required every telegraph, telephone and express company doing business in Ohio to file a return to the State board, setting forth, among other things, the number of shares of its capital stock, the par and market value thereof, and, when the shares had no market value, their actual value at the date of the return; also a statement in detail of the entire real and personal property of the company, where it was located and its value. Express companies were also required to include a statement of their entire gross receipts for the year, from whatever source derived, of business wherever done and of that done in the State of Ohio, giving the receipts of each office in the State, and the whole length of rail and water routes over which the company did business within and without the State. The board was required to meet in June and assess the value of the property of the companies in Ohio under the following rule:[1]

[1] Adams Express Co. v. Ohio, 165 U. S. 194, 41 L. Ed. 683 (1897).

"In determining the value of the property of said companies in this State, to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

§ 272. **Ohio Express Company Cases.**—In the case of express companies, the apportionment was to be made among the several counties in which they did business, in the porportion that the gross receipts in each county bore to the gross receipts in the State. The amount thus apportioned was to be certified to the county auditor and there taxed at the same rate as other personal property. Provision was made for hearing and for the correction of erroneous and excessive valuations. Assessments were made upon the property of the express companies in Ohio as follows:

Adams Express Company.....	$533,095.80
American Express Company.....	499,373.60
United States Express Company.....	488,264.70

Bills were filed to enjoin the collection of these taxes, on the ground that the companies had no property in the State of Ohio except certain horses, wagons, harness and the like, and that the value of their capital stock or shares and of express companies generally was determined, not so much by the value of their property and appliances, as by the skill, diligence, fidelity and success with which they conducted their business. They claimed that they owned property of great value which was not situated in the State of Ohio and that their business connections, reputation and good-will had entered largely into the value of their capital stock and shares; that the market price was speculative and variable, dependent upon financial conditions not connected with the business of the company or its property; and that the method of taxation was violative of the Constitution,

was an illegal burden upon interstate commerce and was a denial of the equal protection of the laws.

The express companies returned the value of their property in and out of the State, the whole gross receipts in the State and the length of their lines in and out of the State, but made no return of their entire gross receipts of business wherever done, nor of the terms of their contracts or arrangements for transportation. The court held, opinion of Chief Justice Fuller, that the act was not open to the objections claimed, under the Federal Constitution, saying at page 220:

"As to railroad, telegraph and sleeping car companies engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines of business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any Federal restriction."

The court conceded that there was a difference between the property of railroad and telegraph companies and that of express companies, but maintained that there was the same unity in the use of the entire property for a specific purpose, and the same elements of value arising from such use. It said, at pp. 221 and 222:

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of a railroad, telegraph and sleeping car companies, to roadbed, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others."

The court said it was this unity of use which enabled $23,400 of horses, wagons, safes and so on, in the State to produce

$275,446 in a single year. It declared that the language of Justice Lamar in the case of Pacific Express Co. v. Seibert,[1] that express companies have no tangible property of any consequence subject to taxation, was used with reference to the legislation of the State of Missouri, and had no application to the scheme of taxation now under consideration. The property taxed in this case had its actual *situs* in the State, and was therefore subject to the State's jurisdiction, and the distribution among the several counties was a matter of regulation for the State legislature. There was no attempt to tax property having a *situs* outside the State, but only to place a just value on that within. The court added, at page 227:

§ 273. **Special Circumstances Requiring Deduction Must be Shown.**—"Special circumstances might exist, as indicated in Pittsburgh, Cincinnati, etc., Railway v. Backus, 154 U. S. 421, 443, which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the cases at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis.

"The States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute."

The classification of express with railroad and telegraph companies as subject to the unit rule does not deny them the equal protection of the laws, and there was nothing in the

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[1] 142 U. S. 339, l. c. p. 354, 35 L. Ed. 1035 (1892), affirming 44 Fed. 310.

procedure here used which was obnoxious to the constitutional provision.[1]

§ 274. **Rehearing of Express Company Cases Denied.**—A motion for rehearing was filed in this case, with exhaustive briefs. The rehearing was claimed on different grounds, including the extreme importance and far-reaching effect of the decision, the entire novelty of the questions discussed and the points necessarily determined by the judgment. It was urged that the opinion was inconsistent with the opinion in the railway case,[2] and the Indiana telegraph case.[3] The doctrine of unity in use applied to railroad and telegraph companies, counsel also argued, has no application to the horses and wagons and other property employed by an express company, as there is no physical unity, and the doctrine of unity in use of property which has no connection except in the fact of its employment is no basis for taxation.[4]

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[1] Justices Gray, Brewer, Shiras and Peckham concurred with the Chief Justice; but strong dissent was made by Justices White, Field, Harlan and Brown. The opinion filed by Justice White on behalf of those dissenting insisted that there was no power in the State to tax property outside of its jurisdiction, which in effect it had done in this case under the theory of a homogeneous unit; and that the mere fact that the same owner had property in different States which contribute to his earnings does not create such a unity for the purposes of taxation as to make the property located in one State taxable in another. It was asked, why could not the same rule be applied to a corporation or partnership engaged in the dry goods business, or any other business having branches in different States, on the theory that there was a unity of earnings between the agencies in all the establishments? This would warrant any State, in which one of the branches was established, in taxing the whole on the theory of unity.

For opinion of the Circuit Court, see Ohio v. Jones, 51 Ohio 492.

Judge Taft, then U. S. Circuit Judge, had held the law invalid under the Constitution of Ohio, Adams Ex. Co. v. Poe, 61 Fed. 470, but subsequent to the ruling of the State court held it valid, W. U. Tel. Co. v. Poe, 64 Fed. 9, and the judgment was affirmed in the U. S. Circuit Court of Appeals, Sanford v. Poe, 37 U. S. App. 378, and 69 Fed. 546.

[2] C. C. C. and St. L. Railway Co. v. Backus, 154 U. S. 439, *supra.*

[3] Western U. Tel. Co. v. Taggart, 163 U. S. 1, *supra.*

[4] See brief by James C. Carter of New York, and Lawrence Maxwell, Jr., in report of case, 166 U. S. 217, 41 L. Ed. 965 (1897).

The petition was denied in a vigorous opinion by Justice Brewer, who said that the contention that the property was beyond the limits of the State ignored the existence of intangible property in which a large part of modern wealth consisted. He said if the State comprehends all property in its scheme of taxation, then the good will of the organized and established industries must be recognized as a thing of value. Whatever the property was worth to its stockholders for purposes of income, it was worth in determining its value for taxation.

As to the *situs* of the intangible property, the court said that the *situs* of this intangible property was not where the home office was, but it was distributed where the tangible property was located and its work done. He said the maxim *mobilia sequntur* was never for universal application and seldom interfered with the right of taxation. It was conceded that injustice to corporations would result by the conflicting action of different States, and the courts might be called upon to relieve against such abuses, and yet all such possibilities did not equal the wrong which sustaining the contention of the appellants would at once do, the court concluding as follows:

"The injustice of this speaks for itself. In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such burden of taxation, as a fair distribution of the actual value of their property among those States requires."

§ 275. **The Enforcement of Mileage Apportionment.**—The ruling of the Supreme Court in the express company cases has definitely established the principle of mileage apportionment in the assessment of interstate railroads for taxation. In a case from Kentucky where an express company had accumulated a surplus of more than twelve million dollars and had separated such amount from its business and invested it in securities which had been transferred to a trust company in New York, and then issued to its stockholders as a distributive share thereof bonds

of the express company payable out of the securities so deposited as a special dividend, the express company retaining such property rights in the securities, by which in certain contingencies creditors might reach them, it was held that such bonds and stocks so transferred to the trust company constituted an outside investment of surplus earnings, which could not be included in the assessment of the value of the express company's intangible property taxable in Kentucky.[1]

In computing the mileage of an interstate railroad company for the purpose of assessment of its franchises under the Kentucky statute, which required an apportionment of the mileage as a factor in determining the capital stock therein, the length of all the lines of that railroad owned, leased or controlled or operated by the company in the State, or elsewhere, was to be taken into consideration.[2] The market value of bonds, stocks and gross earnings and net earnings have been held better evidence of value of railroad property for taxation in the State than the cost of the reproduction of the tangible property. The presumption is that the property of a railroad company is held for railroad uses, and that this value is distributed throughout its mileage. Franchises, contracts, privileges and good will of the railroad company presumptively enhance the value of any part of its tangible corporate plant.[3]

§ 276. **Kentucky Express Company Case.** — The case of Adams Express Co. v. Kentucky,[4] involved the Kentucky statute imposing a tax upon every corporation having or exercising any exclusive privilege or franchise not allowed by law to natural persons, or performing any public service. The statute

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[1] Coulter v. Wear, C. C. A. 6th Circuit (1904), 127 Fed. 897.

[2] L. & N. R. Co. v. Bosworth, 230 Fed. 191.

[3] A. T. & S. F. R. Co. v. Sullivan, 173 Fed. 456. See also as to the application of this principle of mileage apportionment of different interstate properties, Pullman Co. v. Traft, 186 Fed. 126 (1911); Western Union Tel. Co. v. Wright, 185 Fed. 250 (1911); Michigan Telegraph Tax Cases, 185 Fed. 634 (1911); Great Northern R. Co. v. Oconogan County, 223 Fed. 198.

[4] 166 U. S. 171, 41 L. Ed. 960 (1897).

provided that, in addition to other taxes imposed by law, every such corporation should pay an annual tax on its franchise to the State, and a local tax thereon to the county. The court sustained the tax thereby levied upon the express company, saying in an opinion by Chief Justice Fuller, that, taking the whole act together, the word "franchise" in the statute was not employed in a technical sense, but that the legislative intention was plain that the entire property, tangible and intangible, of all foreign and domestic corporations and all foreign and domestic companies possessing no franchise should be valued as an entirety, the value of the tangible property thus ascertained be taxed under these provisions. The reasoning of the Ohio case applied here.[1]

§ 277. **Power of State in Valuing Interstate Properties as Defined by Supreme Court.**—The unit rule of valuation, that is the valuation of the portion in the State of the entire property, tangible and intangible, in and out of the State, as an entirety, being the value in use as distinct from the value of separate detached parcels located in the State, has thus been sustained by the United States Supreme Court in relation to railroad, telegraph and express companies. But the value of property out-

[1] The same four judges dissented in this case as in the Ohio case, Justice White on their behalf saying that this differed from the Ohio case, in that there the statute purported only to tax the tangible property within the State, but empowered the assessing board to consider its value as augmented by the use to which such property might be put. "In other words, the Ohio law, as construed by the Supreme Court of that State, taxed only tangible property within the State enhanced in value by intangible elements outside the State. We considered, in dissenting in the Ohio case, that this was a mere disguise, a distinction without a difference, but the court held otherwise. In this case, by the law in question, the mask is thrown off, and what we conceive to be logically the thin disguise under which the courts of Ohio supported its statute is not asserted to exist, but the Kentucky statute, in unambiguous and unmistakable language, imposes the imperative duty upon the assessing board to assess property both in and out of the State. That is to say, it leaves nothing to implication or to evasion, but declares in plain English that property in and out of the State shall be assessed."

side of the State, which is necessarily involved in valuing interstate property as an entirety, is only allowed to be considered as a means of arriving at the value of the property which is within the State, that is, the State's proportionate part of the value of the entire property. In the absence of evidence to show that such apportionment is unjust, the State may determine what part of the entire property is located within the State by the mileage rule of apportionment. That rule therefore has not been sustained as an absolute rule in the case of interstate properties, although it seems to have been in the case of intra-state properties, that is, such a method of intra-state apportionment violates no Federal law.[1] Thus the court in the Indiana railroad case[2] said that the Indiana statute did not require that the value of the road should be "determined absolutely" by dividing the gross value on the mileage basis, but only that the amount of stock and indebtedness should be "presented for consideration" by the State board; and that it is *ordinarily* true that the mileage apportionment is fair and just.

§ 278. **Evidence of Inapplicability of Mileage Rule Admissible.**—As incident to this unit rule of valuation with mileage apportionment, the corporation has the right to show by all proper evidence that the application of the mileage rule of apportionment to such valuation is for any reason imperfect and injust. Thus it may show that it holds property included in such valuation as an entirety which is exempt from taxation. It may also show that its property in other States is of disproportionate value, as, for instance, that it is located in a more densely settled community, where it is proportionately more productive, or consists of terminals in large cities of other States. All such facts are relevant as bearing upon the value of the State's portion of the entire property. A State statute or procedure by a State under a statute, which denied the company the opportunity of proving such facts, would doubtless be held invalid. Thus in the Indiana tele-

[1] See *supra*, Sec. 270.

[2] 154 U. S. 430, *supra;* Illinois Central R. R. Co. v. Green (June, 1917), — U. S. ___, — L. Ed. —.

graph company case, *supra,* Sec. 270, the statute was held valid because it had been construed by the Supreme Court of the State as requiring a deduction from the valuation if such circumstances were shown.

§ 279. **Stock Market Quotations as Evidence of Value.**—In determining the value of the entire property under the unit rule, the State authorities may consider any facts tending to show that value. Thus the stock market quotations of the company's securities may be considered because the stock and indebtedness represent the property. But they are not to be regarded as conclusive standards or tests of value, and they have not been declared to be such by the Supreme Court. They are *indicia* of the then existing public estimate of the value of the company's property as shown by the result of the relative pressure of buying and selling orders for small interests in that property. In the language of the Supreme Court[1] such quotations represent—

"The faith which a purchaser of stock in such a company has in the ability with which the company will be managed, and in the capacity to make future earnings. It may be well or ill founded. It is but matter of opinion which in itself is not property. While the value of the property is one of the material factors going to make up the market value of the stock, yet it is plainly not the sole one. Mere speculation has not uncommonly been known to exercise a potent influence on the market price of stock."[2]

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[1] Pullman's Car Co. v. Transportation Co., 171 U. S. 155, 43 L. Ed. 108 (1899).

[2] See Sec. 270, *supra.* This case involved the value of the property of a manufacturing company and was not one of taxation. The franchise value was excluded as not properly considered in determining the value of the property. But the other reason for excluding market value, the existence of speculative considerations therein, may apply to a case of taxation. See case of People *ex rel.* v. Coleman, 126 N. Y. 433, for discussion of the relation of market value to "actual value." The court said that when the amount of capital and surplus was undisclosed and unknown, the assessor could consider the market value not as the thing to be valued and taxed, but as an aid to discovering actual value.

The taxing authorities have the right to consider such evidence, but as evidence only. Thus in the Indiana railroad case, *supra,* Sec. 263, the certificate of the assessing board stated[1] that in arriving at the basis of the estimate of values, the board had considered the cost of construction and equipment, the market value of the stocks and bonds, the gross and net earnings, and all other matters appertaining thereto that would assist it in arriving at the true cash value of the same.

§ 280. **Presumption that All Evidence Submitted was Considered in Valuation.**—Whatever evidence, relative to the value of the property as an entirety and the disproportionate value of the property in other States, is submitted to the assessing board, it is presumed that the board takes all those matters into consideration in connection with its information relative to the total amount of the stock and indebtedness of the company. There can be no presumption that the board took into consideration matters which were not properly receivable and properly to be considered in making such valuation. This is the rule applied in all cases of the assessment of property for taxation, even in jurisdictions where a judicial review of the proceedings of tax assessing boards is allowed. The presumption is always that the valuation is based upon the evidence submitted.[2] It is true however, that in this class of cases there is sometimes great practical difficulty in determining that an assessing board considered only proper elements of valuation in calculating the value of property within the State, and this may be a practical embarrassment in the judicial review of the action of such *quasi* judicial tribunals.

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[1] 154 U. S. 433, *supra.*

[2] As to the right to have the property, when the value in the State is ascertained, assessed equally with other property, see *infra,* Chapter XVI, "Equal Protection of the Laws;" see also *infra,* "Due Process of Law in the Assessment of Interstate Properties," Chapter XIV.

CHAPTER IX.

TAXATION OF NATIONAL BANKS.

§ 281. Taxing authority of States over national banks.
282. Amendment of 1868.
283. Supreme Court on U. S. statute authorizing State taxation of national banks.
284. Method of State taxation allowed by U. S. statute is exclusive.
285. State franchise tax not enforceable against national banks.
286. State may require bank to pay tax for shareholders
287. Place of taxation.
288. Manner of assessment.
289. Real estate in other States not deducted from value of shares.
290. Territories have same taxing power as States over national banks.
291. No deduction on account of holding United States securities.
292. Discrimination through taxation of State banks on capital or property.
293. Other moneyed capital "is other taxable moneyed capital."
294. Equality of taxation with other moneyed capital.
295. Discriminations through exemptions from taxation.
296. Allegations of discriminating exemption held to require answer.
297. Rules of Supreme Court as to discrimination.
298. Discriminating exemption must be of competing moneyed capital.
299. Meaning of "other moneyed capital."
300. No discrimination in New York taxation of railroad, business, mining or insurance companies.
301. No discrimination in New York taxation of trust companies.
302. Nor in exemption of deposits in savings banks, building and loan associations or stock in foreign corporations.
303. Discrimination through deduction of debts from "other moneyed capital."
304. No discrimination in deduction of debts from non-competing capital.
305. No discrimination in deduction of debts of unincorporated banks.
306. Discrimination through failure to assess other moneyed capital.
307. Tax upon deposits held not discriminative.
308. Discrimination must be substantial.
309. A difference in taxation not necessarily discriminative.

310. Resident and non-resident shareholders.
311. Difference in the rate of taxation not necessarily discriminative.
312. Equality of taxation requires equality in valuation as in rate of taxation.
313. Supreme Court on assessor's practice of valuation.
314. Inequality must be intentional and habitual.
315. Mere mistake in judgment no discrimination.
316. Formal resolution not necessary for intentional discrimination.
317. A California discrimination in valuation held discriminative.
318. Difference in valuation between different classes of personalty not discriminative against national banks.
319. Taxation of real estate of national banks.
320. Double taxation of national banks.
321. Enforcement of tax.
322. Visitorial power of State over national banks.
323. The remedy by injunction.

§ 281. **Taxing Authority of State Over National Banks.**[1]— National banks, organized under Act of Congress, are instrumentalities of the Federal government created for national public purposes, and as such are subject to the paramount authority of the United States. It has been held by the Supreme Court, not only that any attempt by a State to define their duties or control the conduct of their affairs is absolutely void, but that the "respective States would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."[2]

[1] A number of decisions have been rendered in the State courts and United States Circuit Courts on the subject of State taxation of national banks, where subsequently the questions discussed have been definitely decided by the Supreme Court. Other decisions of these courts relate to the question of construction of State statutes, which are not within the scope of this work. It has been the aim, however, to give such of the State decisions as apply and distinguish the rules laid down by the Supreme Court, or which bear upon questions not included in the decisions of that court.

[2] Owensboro National Bank v. Owensboro, 173 U. S. 664, l. c. p. 668, 43 L. Ed. 850 (1899); Davis v. Elmira Savings Bank, 161 U. S. 276, 40 L. Ed. 700 (1896), reversing 142 N. Y. 590, 25 L. R. A. 546. This

limitation upon the taxing power of the State is more comprehensive than that laid down by the court in McCulloch v. Maryland, *supra*, Sec. 7. The taxes declared void in that case and in Osborn v. United States, *supra*, Sec. 8, were upon the operations of the bank, and the ruling was declared not to extend to a tax on the real property of the bank nor to a tax on the interest of citizens in the bank, when taxed in common with other property of the same description.

The first Act of Congress providing for the organization of national banks, passed February 25, 1863,[1] contained no grant of power to the States to tax national banks in any form; but the amendatory Act of June 3, 1864,[2] Sec. 41, provided as follows:

"(1) Provided that nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. (2) Provided, further, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares of any of the banks organized under authority of the State where such association is located. (3) Provided, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

It is also provided in Sec. 40 that the president and cashier shall cause to be kept a full and correct list of the names and residences of all the shareholders and the number of shares held by each, in the banking office, and that the list shall be subject to the inspection of all shareholders and creditors of the association and the officers authorized to assess taxes under State authority, during the business hours of each day.

§ 282. **Amendment of 1868.**—In 1868, the section of the statute authorizing the taxation of national banks was amended

[1] C. 58, 12 Statutes 665.

[2] C. 106, 13 Statutes 99.

and re-enacted in the form in which it has since appeared in the Revised Statutes, as follows:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State in which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

It will be observed that the provision in the original act, that the tax should not exceed the rate imposed upon the shares of any of the banks authorized under the authority of the State where the association was located, is stricken out. This amendment however, was not material, as the prohibition of discrimination in favor of State banks is included in the provision that the shares shall be taxed at no greater rate than is assessed upon "other moneyed capital" in the hands of individual citizens of the State; for this clearly includes shares of stock in State banks.[1] The only other amendment relates to the place of assessment, the original act providing that the assessment must be at the place where the bank is located and not elsewhere, while in the amended act the legislature may determine the manner and place of taxation, subject to the restriction as to place, that the shares of non-residents shall be taxed at the location of the bank.

§ 283. **Supreme Court on U. S. Statute Authorizing State Taxation of National Banks.**—The Supreme Court,[2] after quoting this statute, Sec. 5219, says:

[1] Mercantile Bank v. New York, 121 U. S. 138, 30 L. Ed. 895 (1887).

[2] Owensboro National Bank v. Owensboro, *supra.*

"This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any State tax therefore which is in excess of and not in conformity to these requirements is void.

"So self-evident are these conclusions that the adjudicated cases justify the deduction that they have been accepted from the beginning as axiomatic and unquestioned, since the controversies as to taxation of national banks illustrated in the opinions of this court mainly depend, not upon any attempted exercise of a power to tax the property and franchises of the banks, but involved controversies as to whether, when the shares of stock in the names of the shareholders had been assessed according to law, the tax could be imposed upon them because of alleged discrimination or other illegalities."

In a later case the court said that the only taxation of national banks contemplated by the U. S. statutes is taxation on the shares of stock of the bank and on its real property.[1]

§ 284. **Method of State Taxation Allowed by U. S. Statute is Exclusive.**—The taxing power of the State in relation to national banks, thus resting upon the permission of Congress, and Congress having provided the method in which this power may be exercised, that method excludes any other.

No license therefore can be exacted by the State or under State authority for the privilege of carrying on the business of a national bank,[2] nor can an occupation tax be imposed,[3] nor can a tax levied by a State on the president of each of the banks of the State be enforced as to the president of the na-

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[1] First National Bank v. Albright, 208 U. S. 547, 52 L. Ed. 614 (1908), affirming 86 Pac. 548.

[2] Second National Bank of Titusville (Pa.) v. Caldwell, 13 Fed. 429; Carthage v. First National Bank of Carthage, 71 Mo. 508.

[3] Brooks v. State (Texas), 58 S. W. Rep. 1033; Nat. Bank of Chattanooga v. Mayor, 8 Heiskell (Tenn.) 814. National banks are not liable to a privilege tax imposed by a city ordinance on occupations and business transactions, although banks and banking are included in its terms.

tional bank.[1] The State can tax the real estate of the bank as other real estate is taxed, because authority to do so is expressly given by the Act of Congress. But this is the only tax which can be levied upon the property of the bank, for the only other tax authorized is upon the shares of the shareholders. It follows therefore that no tax can be levied by the State upon the personal assets of the bank, such as safes, office furniture, etc.,[2] and this is equally true whether the bank is solvent or insolvent.[3] Thus the assets of the bank, when in the hands of a receiver, are not taxable. The Supreme Court said, in Rosenblatt v. Johnston, that if the shares had any value they were taxable in the hands of the holders, and that the property held by the receiver was exempt to the same extent, as it was when in the possession of the bank before his appointment. A tax on the personal property of a national bank is invalid, even though the legislature has made no provision taxing the shares thereof, and the tax actually levied does not exceed the amount of what might have been assessed on the shares under local authority therefor.[4]

§ 285. **State Franchise Tax Not Enforceable Against National Banks.**—It follows that a national bank cannot be taxed by a State under a statute taxing "the property and franchises of every corporation having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service." This

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[1] Linton v. Childs, 105 Ga. 567.

[2] National State Bank v. Young, 25 Iowa 311; San Francisco v. Bank, 92 Fed. 273; State v. First Nat. Bank, 4 Nev. 348; First National Bank v. Province, 20 Montana 374.

[3] Rosenblatt v. Johnston, 104 U. S. 462, 26 L. Ed. 832 (1882). See also First National Bank v. San Francisco, 129 Cal. 96; Stapylton v. Thaggard, 91 Fed. 93, and 33 C. C. A. 353; City of Boston v. Beal, 5 C. C. A. 26, 55 L. Ed. 26, First Circuit; People v. National Bank, 123 Cal. 53; Covington City National Bank v. Covington, 21 Fed. 484; Woodward v. Ellsworth, 4 Colo. 580; Baker v. King County, 17 Wash. 622.

[4] First Nat. Bank v. San Francisco, 129 Cal. 96.

was the decision in a case from Kentucky.[1] The State Court of Appeals decided that the taxation of national banks under this statute was valid, as in effect it was equivalent to a tax upon the shares of the shareholders. The Supreme Court however reversed this decision, and said that the argument relied on, if adopted, would operate to destroy the power to tax which the Act of Congress sanctions, and that, as a general principle, it is settled that the taxation of property, franchises and rights of a corporation is one thing, and the taxation of the shares of stock in the names of the shareholders quite another. The Court said in this regard, at page 681:

"This doctrine has been applied to sanction the taxation of the one where the other was covered by a contract of exemption. As a result of its application much property has been brought within the range of the taxing power which otherwise would escape taxation."

It said further that, as there is no equivalency between the assessment of the bank and the assessment of the shares, it follows that the tax, which was assessed on the franchises of intangible property of the corporation, was not within the purview of the authority conferred by the Act of Congress, and was therefore illegal. It was strongly argued that there was an equivalency *in fact*, as the tax was no greater than that which would have been imposed in the form of a tax levied upon the shareholders, the franchise tax being based upon the valuation of the combined sum of the par of the stock, the surplus and undivided profits. But the court said that if mere coincidence of the amount and not legal power were the test, only pure questions of fact would arise in any given case, and continued: "The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one the unlawful tax

[1] Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, *supra*. The same statute was construed by the court in the case of Adams Ex. Co. v. Ky., 166 U. S. 171, *supra*, Sec. 276, and Henderson Bridge Co. v. Kentucky, *supra*, Sec. 215.

should be held valid, does not strike us as worthy of serious consideration."[1] The court added:

"The system of taxation devised by the act of Congress is entirely efficacious and easy of execution. By its enforcement, as interpreted, settled policies of taxation have been evolved embracing large amounts of property which would not otherwise be taxable, and which, as we have seen, will escape taxation if the past development of the system be destroyed by recognizing, without reason, a principle inconsistent with the law and destructive of the safeguards which it imposes."

"From the foregoing conclusions, it results that as the taxes were imposed upon the bank and its property or franchise, and not upon the shares of stock in the name of the stockholders, such taxes were void."[2]

§ 286. **State May Require Bank to Pay Tax of Shareholders.**—Though the tax is only authorized to be levied upon the shares of the individual shareholders, and there is no authority to levy any tax upon the corporate property other than a tax upon the real estate, the State may require that the tax levied upon the shareholders shall be paid through the bank, which is thus made the agency of the shareholders in paying the tax, and which may recoup itself from the dividends. This was decided by the Supreme Court in a case from Kentucky, where it held[3] that the statutory appointment of the bank to pay the whole tax *in solido* as the agent of the shareholders was not inconsistent with the Federal law, authorizing only the tax upon the shareholders. It was further said that this was the only mode by which, certainly and without loss, the payment of the tax on all the shares, resident and non-resident, could be secured. This method of collection was justified by experience, and it was not to be rightly inferred,

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[1] But as to the effect of equivalency in fact, see Postal Tel. Cable Co. v. Adams, Sec. 233, *supra*.

[2] This Kentucky statute was also discussed in Scobee v. Bean, 22 Ky. Law Rep. 1076, 59 S. W. Rep. 860; First National Bank v. Stone, 88 Fed. 409.

[3] National Bank v. Commonwealth, 9 Wall. 353, 19 L. Ed. 700 (1870).

therefore, that Congress intended to prohibit it, after having expressly permitted the State to levy the tax.[1]

Where the bank has been made liable for the payment of the tax upon the shares of its stockholders, it has been held that the State may force the bank to pay the tax by distraint of its property.[2] The distinction however between a tax upon the bank as the statutory agent of its shareholders and a tax upon the bank property as such must be preserved, as the former tax is authorized by the Act of Congress and the latter is not. Thus an assessment upon the property as such, or against the bank upon the stock *in solido*, is invalid.[3] This

[1] This mode of collecting the tax upon national bank shares has been very generally adopted. (See State Taxing Systems, *infra*, appendix). In Hershire v. First National Bank, 35 Iowa 272, it was held that under the Iowa statute a national bank was not liable for the taxes assessed against the shareholders unless it had in its possession dividends or property belonging to them. The case was distinguished from National Bank v. Commonwealth, 9 Wall. 353, *supra*. The decision was based on the difference between the statute in issue and that of Kentucky, the Iowa statute making the bank simply the agent of the shareholders to pay the tax. The court said that the bank was not liable for the taxes except as other agents are when they have money belonging to the principal to pay them with. National Bank v. Commonwealth was also distinguished in Sumpter Co. v. Nat. Bank of Gainesville, 62 Ala. 464, where it was held that the levy upon the stock of the bank was not authorized by the statute of that State. See also Mechanics Bank v. Baker (N. J.) 46 Atl. 586, 65 N. J. L. 113, 549.

[2] First National Bank of Omaha v. Douglas County, 3 Dillon 330. It was said by Judge Dillon: "Undoubtedly the bank could be made liable to pay such taxes by suit, and no reason is seen why the collection may not be enforced by distraint in the same manner as other taxes are collected."

[3] First Nat. Bank of Hannibal v. Merideth, 44 Mo. 500; City of Springfield v. First Nat. Bank, 87 Mo. 441, where it was held that the refusal of the officers of the bank to furnish the assessor with a list of the shareholders did not justify him in making the assessment and enforcing the tax against the property of the bank. First Nat. Bk. v. Faucher, 48 N. Y. 524; Nat. Bank of Chemung v. Elmira, 53 N. Y. 49; First Nat. Bk. v. Richmond, 42 Fed. 877; Albuquerque Nat. Bk. v. Perea, 5 N. Mex. 664; 1st Nat. Bk. v. Chehalis Co., 6 Wash. 64; Miller v. Merchants' Nat. Bk. (Ohio), 3 Nat. Bk. Cases 711.

distinction is essential for the further reason that in States where deduction of debt is allowed in the assessment of "other moneyed capital," the national bank shareholder is entitled to a deduction of his personal indebtedness.[1]

Making a national bank the agent of the State to collect taxes assessed against the shares of the bank has been held by the Supreme Court to be a mere matter of procedure, and there is no discrimination against national banks where the State banks are not thus compelled to pay taxes for their shareholders, and the shareholders are looked to directly for such payment.[2]

§ 287. **Place of Taxation.**—The Act of Congress provides that the legislature of each State may determine the manner and place of taxing the shares, subject to the restriction that those owned by non-residents of the State shall be taxed in the city or town where the bank is located and not elsewhere.[3] Where within the State the shares shall be taxed therefore, whether in the town or city where the bank is located or in the locality of the shareholder's residence, is subject to the determination of the State.[4]

The shares of non-residents of the State however are only

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[1] First Nat. Bank of Richmond v. City of Richmond, 39 Fed. 309.

[2] Merchants' Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236 (1897), affirming 168 Penn. 309.

See National Bank of Commerce v. Allen, 223 Fed. 472. See also Charleston National Bank v. Melton, 171 Fed. 743.

[3] The act of 1864 provided for including the shares in the valuation of personal property at the place where the bank was located and not elsewhere, and there was a conflict of judicial opinion as to whether the word "place" meant the State or the town where the bank was located. Opinion of Justices, 53 Me. 594; Austin v. Aldermen, 14 Allen 359; Markoe v. Hartranft, 6 Am. Law Reg. 487. A statute of Illinois providing for the taxation of shares in the city where the bank was located was valid, see Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. Ed. 189 (1874). But the court did not decide whether the State could provide for the taxation of shareholders at any other place within its jurisdiction. See also Austin v. Aldermen, 7 Wall. 694, 19 L. Ed. 224 (1869); Waite v. Dowley, 94 U. S. 527, 24 L. Ed. 181 (1877).

[4] Buie v. Commissioners of Fayetteville, 79 N. C. 267.

taxable at the location of the bank. The holder of national bank shares is thus protected against double taxation under competing State authority, for such shareholder cannot be taxed at his domicil on shares in a national bank located in another State.[1] The Supreme Court of Massachusetts said, in the case cited, that, "whatever may have been the design or motive, we can have no doubt that it is within the constitutional power of Congress to establish a national bank in any State and to provide that its shares shall have such a local nature as to be exempt from taxation by other States; and that this power has been exercised in the present instance."

A national bank has under the law but one location, and therefore only one taxable *situs* based on location. Where the bank was located in New Jersey, and, for the convenience of its customers in Philadelphia, maintained a clerk in that city to receive deposits, it was held not to become subject to taxation in Philadelphia.[2]

Where the statute of a State directs, as it lawfully may, that residents of the State owning stock in national banks located in the State shall be assessed for taxation thereon at their respective residences in the State, such shares must be returned for taxation like other personal property, and they would not therefore be taxable at the location of the bank,[3] when that was not the domicil of the shareholder resident in the State.

§ 288. **Manner of Assessment.**—The Act of Congress provides that the legislature of each State may determine the manner as well as the place of taxation, subject to the other provisions of the act. Bank shares are therefore taxable, as other personal property of like character is taxable under the laws of the State. The property and also the surplus funds of the bank, in whatever form invested, are included in the

[1] Flint v. Board of Aldermen of Boston, 99 Mass. 141.

[2] See National State Bank of Camden v. Pierce, U. S. Circuit Court of Pennsylvania, 2 Nat. Bank Cases 177.

[3] See Buie v. Commissioners of Fayetteville, 79 N. C. 267; also Goldsbury v. Warwick, 112 Mass. 384.

valuation of the shares.[1] The shares are to be valued at their fair cash value on the assumption that the bank will continue its business, and not at what they would be worth in case the bank should be wound up, when that is not in contemplation.[2]

While a State bank is changing into a national bank and before the requirements of the State statute are fully complied with, it is subject to taxation.[3] A national bank is not taxable on increase of stock, that is, the new shares are not taxable, until the certificate of increase is issued by the comptroller.[4]

Shares owned by a national bank in other national banks may be included in the valuation of the shares of the bank.[5] Thus in the case last cited the court said, at page 70: "The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership. The proper inference is, that the law permits in the particular instance the taxation of the national banks owning shares of the capital stock of another national bank by reason of that ownership on the same footing with all other shares."

This principle has been applied to the case where a bank owns certain of its own shares, the value of which should be divided among the holders of the remaining shares in the assessment of the value of their respective interests.[6] It was contended in a Pennsylvania case that national bank shares could not be assessed at more than par, because other moneyed capital, that is money at interest, was only assessed at par, and that par must therefore be the maximum of taxable value of bank shares. But the Supreme Court held this position untenable, because money invested in a bank is not

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[1] First National Bank v. Concord, 59 N. H. 75.
[2] National Bank of Commerce v. New Bedford, 155 Mass. 313.
[3] Commonwealth v. Bank, Penn. Com. Pleas, 2 Pearson 386.
[4] Charleston v. People's Nat. Bank, 5 S. C. 103.
[5] Bank of Redemption v. Boston, 125 U. S. 60, 31 L. Ed. 689 (1888).
[6] Dutton v. Citizens' National Bank, 53 Kansas 440.

money put out at interest, and the par value of stock does not necessarily indicate its value.[1] It is immaterial that the bank's property or surplus may be invested in property itself exempt from taxation, see *infra,* Sec. 291. It is also immaterial that the bank holds stocks of other corporations acquired by it in the course of business, whether such corporations are located in and taxed by the State or not.[2] Deductions are not allowed on that account, unless required to conform to similar deductions allowed in the case of other moneyed capital in the State.

§ 289. **Real Estate in Other States Not Deducted from Value of Shares.**—The value of real estate, located in other States and assessed for taxation there under their laws, is not required to be deducted from the value for taxation of shares of national banks. This was decided by the Supreme Court in a case from Utah,[3] where the refusal of the assessors to make such a deduction was made an objection to the validity of the tax. The court said that the State of domicil is entitled under the National Banking Law to collect taxes upon the full value of the shares of stock, and to permit a deduction for the real estate located in other jurisdictions, the value of which necessarily makes part of the value of the stock, would reduce the real value of the shares for taxation without compensatory equivalent. The language of a Maryland case was adopted, at page 561, as expressing the true rule:[4]

"The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate, or other property beyond the jurisdiction of this State, the latter having control over the shares and their true value,

[1] Hepburn v. School Directors, 23 Wall. 480, 23 L. Ed. 112 (1875).

[2] Pacific National Bank of Tacoma v. Pierce County, 20 Wash. 675.

[3] Commercial Bank v. Chambers, 182 U. S. 556, 45 L. Ed. 1227 (1901), affirming 21 Utah 324.

[4] American Coal Co. v. County Commissioners, 59 Md. 185, 194.

the peculiar nature and value of the investment of the capital stock of the corporation, beyond the limits of the State, can form no proper subject for specific deduction or abatement from the true value of the shares of stock, when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock, and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this State."

§ 290. **Territories Have Same Taxing Power as States Over National Banks.**—It was contended by a national bank of Montana Territory that Congress had only given consent to the taxation of stock in national banks by the States, and therefore such stock could not be taxed by a *Territory*. But the court said[1] that, although this was true according to the letter of the statute, yet the word "State" in this section must be construed in connection with the other sections of the act, and that it was clearly used, not in contradistinction to "Territory," but in its general popular sense, as including both the District of Columbia and the Territories.

§ 291. **No Deduction on Account of Holding United States Securities.**—It was decided by the Supreme Court, reversing the New York Court of Appeals, soon after the adoption of the National Banking Act of 1864, that it is immaterial that the capital of a national bank is invested in obligations of the Federal government, which are expressly exempted by Congress from taxation under State authority, whether held by individuals or corporations.[2] The tax authorized by Congress is therefore not upon the national banks, but upon the interests of their shareholders, and the limited State tax au-

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[1] Talbott v. Silver Bow County, 139 U. S. 438, 35 L. Ed. 210 (1891).

[2] Van Allen v. Assessors, 3 Wall. 573, 18 L. D. 229 (1866), reversing 33 N. Y. 161, Chief Justice Chase and Justices Wayne and Swayne dissenting, claiming that Congress did not intend to subject the national securities even by indirection to State taxation. See also Bradley v. People, 4 Wall. 459, 18 L. Ed. 433 (1867). Hager v. Am. Nat. Bank, 159 Fed. 396, 6th Cir. (1908).

thorized is one of the burdens annexed to the enjoyment of the rights and privileges conferred upon national banking associations. This ruling has been uniformly followed since. National bank shares are thus taxable by State authority at their full value like other property, whether the whole or a part of the capital of the bank is invested in Federal securities.[1]

§ 292. **Discrimination Through Taxation of State Banks on Capital or Property.**—As national securities, whether held by individuals or corporations, are exempt from taxation under State authority, it follows that the State banks when taxed upon their property or capital stock can claim exemption for so much of their property or capital representing their property, as is invested in such exempt securities. The statute of New York in force at the time of the adoption of the National Banking Act authorized the taxation of State banks upon their capital stock, and it was provided that the tax on the shares of national banks should not exceed their par value. But the Supreme Court held, in the case last above cited, all the judges concurring, that this taxation of State banks upon their capital stock involved a discrimination against the national banks. The court said at page 581: "Inasmuch as the capital of the State may consist of the bonds of the United States which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders."

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[1] The validity of a State statute providing for the taxation of National bank stock is not affected by the fact that it does not provide for any deduction from the valuation on account of any United States bonds held by the bank, Charleston National Bank v. Melton, 171 Fed. 743, Circuit Court of S. C. 1909.

The act of Kentucky providing a method of taxing State, national banks and trust companies upon each $100 of value of shares of such banks and companies as construed by the Court of Appeals of the State is not invalid as to national banks under the Federal law as imposing a tax upon their capital and surplus and not on their shares. Hager v. Am. Nat. Bk., 159 Fed. 396, C. C. A. 6th Cir. (1908).

This ruling was made prior to the amendment of 1868, and while there was an express provision in the Act of Congress against discrimination in favor of State banks; this provision, as stated, is included in the more comprehensive provision retained in the amendment of 1868 prohibiting discrimination in favor of moneyed capital in the hands of individual citizens.

§ 293. **Other Moneyed Capital is Other Taxable Moneyed Capital.**—After the decision in Van Allen v. Assessors, *supra*, Sec. 291, the New York statute was amended so as to provide that no tax should be assessed upon the capital of either State or national banks, but that the stockholders in both should be charged upon the value of their shares, though not at a greater rate than was assessed on other moneyed capital in the hands of individual citizens in the State. This was also claimed to be invalid, because the personal property of individuals was allowed a deduction on account of their holdings of United States securities, and therefore there was a discrimination in their favor as against the national banks. The court held[1] that this was not such a discrimination as was contemplated by the Act of Congress. The true construction of the clause of the Act of Congress is that the rate of taxation upon the shares shall be the same and no greater than that upon the moneyed capital of individual citizens that is subject to taxation, and the argument really meant that Congress should have repealed the exemption of securities in order to effect equality of taxation.

While the statute of 1864 was in force, it was claimed that the taxation of national bank shareholders in Missouri was invalid, for the reason that the State by charters granted under the former constitution, authorizing exemptions from taxation, had made contracts of exemption with two banks and had thus disabled itself from taxing their shareholders in the same manner

[1] Van Allen v. Commissioners, 4 Wall. 244, 18 L. Ed. 344. See also Bradley v. People, 4 Wall. 459, *supra*, applying the ruling of Van Allen v. Commissioners to the taxing laws of Illinois. See also Exchange Nat. Bank v. Miller, 19 Fed. 372.

as those of national banks were taxed. The court decided[1] however, that this was not a discrimination within the meaning and intent of the act, and that Congress meant no more than to require of each State, as a condition for the exercise of the power to tax the shares of national banks, that it should tax them in like manner as it did the shares of banks of its own creation, so far as it had the capacity.

The same principle was applied in Delaware,[2] where the only subjects of taxation were real estate, live stock and bank shares. The court held that the words "other moneyed capital" imply that national bank shares are to be classed as moneyed capital; and, as national banks were subject, under the Delaware law, to a tax of only one-fourth of one per cent, which was the rate imposed upon each share of the actual value of every banking institution of Delaware, there was no ground for complaint.

§ 294. **Equality of Taxation With Other Moneyed Capital.** —The National Banking Act, as amended in 1868, provides that the assessment upon the shares of national bank stock shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of a State. Difference in the rate of the tax levy between bank shares and other moneyed capital would be too obvious a discrimination for question.[3] But there have been a number of cases of alleged discrimination against national banks in State taxation, growing out of the peculiarities in the different taxing systems of the States. Thus some States allow deductions of debts from taxable credits only, and others allow no deduction whatever. In some States the sources

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[1] Lionberger v. Rowse, 9 Wall. 468, 19 L. Ed. 721 (1870), affirming Supreme Court of Missouri.

[2] First Nat. Bank of Wilmington v. Herbert, 44 Fed. 158.

[3] That is, an *actual* not an apparent difference in rate, see Merchants' & Manufacturers' Bank v. Pennsylvania, 167 U. S. 461, *supra*. It was held in Providence Institution for Savings v. Boston, 101 Mass. 575, that the rate upon bank shares need not be as low as the lowest rate upon moneyed capital anywhere in the State, but it is sufficient if the rate on the bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located.

of municipal and State revenues have been separated, and there is a consequent difference in the method of taxation of different classes of property. Also the States differ much in the matter of exemptions from taxation allowed according to the different views of public policy, and in the methods adopted to solve the difficult problem of taxing the different classes of personal property. The cases of alleged discrimination against national banks may therefore be grouped into the following classes:

First, discriminations through *exemption* of other property; second, discriminations through *deduction* of debts from the valuation of other property; and third, discriminations through *inequality* in the *valuation* of bank shares as compared with other property.

All of these cases of alleged discrimination, particularly the first two classes, must be considered in the light of the construction given by the Supreme Court of the words "other moneyed capital in the hands of individual citizens."

§ 295. **Discriminations Through Exemptions from Taxation.**—There is no discrimination against national bank shares in the limited exemption of property held for charitable and religious uses, allowed by the States from considerations of public policy.[1] Thus it was said by the court, in the case cited, that it was not intended, by the Act of Congress governing State taxation of national banks, to curtail the taxing power of the State or prohibit the exemption of particular classes of property, which the legislature might choose to exempt. The discretionary power of the State legislature over these subjects remains as it was before the Act of Congress was passed, for the plain intention of the act was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power.

In a Pennsylvania case, this principle was extended to the exemption of mortgages, judgments, recognizances and money owing upon articles of agreement for the sale of real estate, all of which were exempted from taxation except for State pur-

[1] Adams v. Nashville, 95 U. S. 19, 24 L. Ed. 369 (1877).

poses. The court held that this did not constitute a discrimination,[1] saying, l. c. page 485:

"This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily there may be other moneyed capital in the locality than such as is exempt. If there is, moneyed capital as such is not exempt Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

§ 296. **Allegations of Discriminating Exemption Held to Require Answer.**—But in a later case from Pennsylvania,[2] the allegations of the plaintiff in his petition were held to constitute a sufficient charge of discrimination to require an answer from the defendants. The Supreme Court reversed the judgment of the State court which had sustained a demurrer to the petition, following the decision in Adams v. Nashville. This petition charged that a very large amount of property in Pennsylvania had been relieved from the burden of county taxation, including all bonds or certificates of loans issued by any railroad company, shares of stock in the hands of stockholders of any institution or company of the State, mortgages, judgments and moneys due or owing upon articles of agreement for the sale of real estate and loans made by corporations, all of which were, taxable for State purposes only.

The court said that, as the Act of Congress does not fix a definite limit as to percentage of value, beyond which the States may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of any particular part of the moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality.

Counsel urged that the State had exempted the railroad and other securities in question from local taxation, because it derived its principal revenue from railroads and corporations, and therefore conserved its own interests in protecting such securities. But the court replied that it was not concerned with the motives of

[1] Hepburn v. School Directors, 23 Wall. 480, *supra.*

[2] Boyer v. Boyer, 113 U. S. 689, 28 L. Ed. 1089 (1885).

public policy which influenced the Commonwealth, and that its sole function was to construe the legislation of Congress permitting the several States to tax national bank shares. If the principle of substantial equality required in State taxation of such shares and other moneyed capital operates to disturb the peculiar policy of any State, the remedy is with Congress.

The court said, with reference to the Hepburn case, *supra*, Sec. 295, that, while this is an authority for the proposition that a partial exemption by a State of moneyed capital for local purposes does not, of itself and without reference to the aggregate moneyed capital not so exempt, establish the right to the same exemption in favor of national bank shares, yet it is by no means authority for the broad proposition that national bank shares can be subjected to local taxation where a very material part, relatively, of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district is exempt from such taxation. It laid down the following rules deduced from the preceding pages, page 695:

§ 297. **Rules of Supreme Court as to Discrimination.** — "1. That the words 'at a greater rate than is *assessed* upon other moneyed capital in the hands of individual citizens' refer to the entire process of assessment, which, in the case of national bank shares, includes both their valuation and the rate of percentage on such valuation; consequently, that the Act of Congress is violated if, in connection with a fixed percentage applicable to the valuation alike of national bank shares and of other moneyed investments or capital, the State law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than in other moneyed capital.

"2. That a State law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than national bank shares, or which permits the taxpayer to deduct from the sum of his credits, money at interest or other demands to the extent of his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital."[1]

[1] See Pollard v. The State, 65 Ala. 628, overruling McIver v. Robinson, 53 Ala. 456.

§ 298. **Discriminating Exemptions Must be of Competing Moneyed Capital.**—This decision, however, as will be seen, was rendered with reference to the sufficiency of the allegations in the complaint, and must be considered in the light of the more restricted meaning of the term "other moneyed capital" adopted by the court in later decisions. Thus in a case from Montana the Supreme Court held[1] that the exemption of the stock of mining corporations does not constitute a discrimination, saying that the restriction imposed in the act requires equality of assessment with other moneyed capital,—not with other property generally, but with that property which passes under the description of moneyed capital, citing Mercantile National Bank v. New York, *infra,* Sec. 299.

§ 299. **Meaning of "Other Moneyed Capital."**—The leading authority on the subject of the definition of moneyed capital adopted by the Supreme Court is found in the New York National Bank Case.[2] Discriminations were claimed, in view of the decision of the court in Boyer v. Boyer, *supra,* Sec. 296, and were based upon the provisions of the New York statute exempting certain classes of personal property, which, it was claimed, constituted a very material part of all the moneyed capital in the hands of individuals. The court, in this case, after reviewing the decisions, defined the meaning of the words "other moneyed capital" as used in the statute, as follows, page 155:

"Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital, the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other cor-

[1] Talbott v. Silver Bow County, 139 U. S. 438, *supra.*

[2] Mercantile National Bank v. New York, 121 U. S. 138, 30 L. Ed. 895 (1887), affirming 28 Fed. 776.

porations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money."

. . .

"The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises, in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."[1]

This meaning of "other moneyed capital," which restricts it to capital competing with national banks, has been reaffirmed in several cases.[2] Thus, the court said[3] that the main purpose of Congress in fixing limits to State taxation on investments in national banks was "to render it impossible for the State in levying such a tax to create and fix an unequal and unfriendly competi-

[1] As to "competing moneyed capital" see also McMahon v. Palmer, 102 N. Y. 176; Mercantile National Bank v. Shields, 59 Fed. 952; Nat. Bank of Baltimore v. Baltimore, 92 Fed. 239.

[2] National Bank of Garnett v. Ayers, 160 U. S. 660, 40 L. Ed. 573 (1896), affirming 53 Kansas 440; Talbott v. Silver Bow County, *supra;* First Nat. Bank v. Chapman, 173 U. S. 205, 53 L. Ed. 669 (1899), affirming 56 Ohio St. 310; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 41 L. Ed. 1069 (1897), affirming 6 Washington 64; Bank of Commerce v. Seattle, 166 U. S. 463, 41 L. Ed. 1079 (1897); Commercial Bank v. Chambers, 182 U. S. 556, *supra;* Lander v. Mercantile Nat. Bank, 186 U. S. 457, 46 L. Ed. 1247 (1902), affirming 105 Fed. 809.

[3] First National Bank of Wellington v. Chapman, *supra.*

tion by favoring institutions or individuals carrying on a similar business'' and investments of a like character. The language of the Act of Congress is to be read in the light of this policy. After quoting from the opinion in Mercantile National Bank v. New York, *supra,* the court said:

''The result seems to be that the term 'moneyed capital' as used in the Federal statute does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute.''

§ 300. **No Discrimination in New York Taxation of Railroad, Business, Mining or Insurance Companies.**—Under the definition of moneyed capital quoted above, it was held by the Supreme Court[1] that there was no discrimination against national banks in the tax system of New York, on account of the exemption of the shares of either railroad, business, insurance or mining companies. The court said that, as to such corporations, so far as the policy of the government with reference to national banks is concerned, it is indifferent how the States choose to tax them, or whether they are taxed at all, and continued at page 156:

''Whether property interests in railroads, in manufacturing enterprises, in mining investments and others of that description are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks.''

It had been held in People v. Commissioners, *supra,* Sec. 19, that there was no discrimination against national banks in the fact of an allowance to insurance companies of a deduction for their holdings in national securities, as such companies are not in the words or contemplation of the Act of Congress. This ruling was reaffirmed.

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[1] Mercantile Bank v. New York, 121 U. S. 138, *supra.*

§ 301. **No Discrimination in New York Taxation of Trust Companies.**— *Trust companies* under the New York statute were taxable at that time for local purposes upon the actual value of their capital stock, but were subject to a franchise tax, in the nature of an income tax, payable to the State. It was urged in the case last cited that this was a discrimination in their favor as against the banks, including national banks.

The court, after enumerating the powers of trust companies under the law of New York, said that they were not banks in the commercial sense of that word, and did not perform the functions of banks in carrying on the exchanges of commerce. It admitted however, that receiving money on deposit and investing in loans and dealing in money and securities did properly bring the shares of stock of their shareholders within the definition of moneyed capital as used in the Act of Congress. But the court found that, under the method of taxation adopted by the State of New York, there was no substantial discrimination, as trust companies paid the State franchise tax in addition to that for local purposes on their capital.[1]

§ 302. **Nor in Exemption of Deposits in Savings Banks, Building and Loan Associations or Stock in Foreign Corporations.**—The deposits in *Savings Banks* in New York, amounting to $437,107,501, with an accumulated surplus of $69,669,000, were admitted by the court[2] to be "moneyed capital." But it was said to be equally clear that such institutions are not within

[1] In Jenkins v. Neff, 186 U. S. 230, 46 L. Ed. 1140 (1902), affirming 163 N. Y. 320, the court reaffirmed this ruling as to trust companies. It was urged that trust companies by recent legislation of New York, had been placed on an equality with banks, and that they were practically doing a banking business competing with national banks. But the court said that there was no change in the legislation of New York which called for any limitation of the decision in the Mercantile National Bank Case. It was to be presumed that if the trust or other companies were exercising powers not authorized by the law, the State would take the proper steps to keep them within their statutory limits, and any neglect in a limited time to do so could not be construed as an assent by the State to such an improper assumption of power.

[2] Mercantile Bank v. New York, *supra*.

the meaning of the Act of Congress, because no one could suppose for a moment that savings banks come into business competition with the national banks of the United States. Their exemption was therefore in accordance with wise public policy, and could not operate as an unfrinedly discrimination against investments in national bank shares. It is immaterial that savings banks are permitted to transact a banking business in the way of loans upon personal securities. They are substantially institutions organized in pursuance of a great and beneficial public policy, for the purpose of investing the savings of small depositors.[1]

The same principle was extended to *Building and Loan Associations,* and it was held that the exemption of their funds from taxation does not constitute a discrimination.[2]

The exemption of municipal bonds of New York amounting to $13,467,000 was held in the same case to involve no discrimination. Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily subject to taxation, they are not within the rule established by Congress.

The court decided further that the exemption of stocks, owned by citizens of New York in corporations created by other States and amounting to at least $250,000,000, constituted no discrimination. It had been decided by the courts of New York that they were not subject to taxation, as they had no *situs* within the territory of that State for that purpose.[3]

§ 303. **Discrimination Through Deduction of Debts from "Other Moneyed Capital."**—The decisions of the Supreme Court, with reference to discrimination through the allowance of deduction of debts from personal property, must be considered in the light of the definition of other moneyed capital first announced in the Mercantile Bank case, *supra,* Sec. 305. Under that definition, where the right of deduction is given to all personal

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[1] Bank of Redemption v. Boston, 125 U. S. 68; Davenport Bank v. Davenport Board of Equalization, 123 U. S. 83, 23 L. Ed. 94 (1887).

[2] Mercantile National Bank of Cleveland v. Hubbard, 98 Fed. 465.

[3] The same ruling was applied to the taxing laws of New Jersey, which did not differ materially from the laws of New York, Newark Banking Co. v. Newark, 121 U. S. 163, 30 L. Ed. 904 (1887).

property, including "other moneyed capital," or to such class of personal property as includes other moneyed capital competing with national banks, the same right of deduction must be given to shareholders in national banks. Thus the State of New York by its taxing policy allowed a deduction of just debts from the valuation of all personal property, excepting so much thereof as consisted of shares of stock in corporations. The Supreme Court held that this statute, as construed by the New York Court of Appeals, was a discrimination against the national bank shares in violation of the Act of Congress, for the owners of these shares could not diminish the amount of their tax by the amount of their debts as could the owners of "other moneyed capital."[1] The statute under which the assessment was made however, was not rendered void by this discrimination, nor was the assessment made thereunder void, but was entirely valid if the stockholder had no debts to deduct. If he had debts, the assessment excluding them from computation was voidable, but the assessing officers acted within their authority in assessing him without deduction, until they were duly notified that he had debts.[2]

A national bank can maintain suit on behalf of its stockholders to enjoin the collection of a tax unlawfully assessed because of the failure to allow for the deduction of debts.[3] The court in the case cited permitted an amendment to the pleadings to allow each stockholder to show the amount of the deduction to which he was entitled.[4]

The statute of Indiana, allowing the taxpayer to deduct from the sum of his credits, money at interest and demands against persons or corporations the amount of his *bona fide* indebtedness, but

[1] People v. Weaver, 100 U. S. 539, 25 L. Ed. 705 (1880). See opinion of New York Court of Appeals in People v. Dolan, 36 N. Y. 59; McHenry v. Downer, 116 Cal. 20, 45 L. R. A. 737 (annotated). People *ex rel.* v. Ryan, 88 N. Y. 142, holds that, where debts are allowed to be deducted from the value of the shares, a debt upon a note for borrowed money which was invested in government bonds should be deducted, although the transaction was a mere device to escape taxation.

[2] Supervisors v. Stanley, 105 U. S. 305, 26 L. Ed. 1044 (1882).

[3] Hills v. Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052 (1882).

[4] As to procedure in matter of claiming deduction, see Stanley v. Supervisors of Albany, 121 U. S. 535, 30 L. Ed. 1000 (1887).

not permitting deduction from any other kind of moneyed capital, was also held to be a discrimination against national banks.[1] Counsel claimed that the statute of Indiana differed from the New York statute. But the court said that "credits, money loaned at interest and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ," and that the "rights, credits, demands and money at interest mentioned in the Indiana statute" meant "moneyed capital invested in that way." An injunction was therefore allowed against the enforcement of the tax as to those shareholders, who proved that they were entitled to deductions for debts.

The taxing system in New York, it was held, could not be said to contravene the Federal law forbidding discrimination against the holders of national bank stock merely because in an individual case it may result that the owner of shares of national bank stock, who is indebted, might sustain a heavier tax than another likewise indebted who has invested his money elsewhere. This did not necessarily mean that there was a discrimination in favor of other moneyed capital.[2]

§ 304. **No Discrimination in Deduction of Debts from Non-competing Capital.**—The restriction of the meaning of "moneyed capital" is illustrated in the rulings of the court with reference to the taxing system of Ohio. Thus it was held[3] that share-

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[1] Evansville Bank v. Britton, 105 U. S. 322, 26 L. Ed. 1053 (1882).

Chief Justice Waite and Justice Gray dissented on the ground that they did not think it was the intention of Congress to require a deduction for debts, from the value of shares, when such deduction was only allowed to other persons from this one kind of moneyed capital. But Justice Bradley dissented for the reason that in his opinion the law was void *in toto* as to national banks; that the probability was that not one in ten of the shareholders would ever have notice of the assessment in time to claim deduction for debts, and one who had notice would naturally be reluctant to make known the amount of his debts before a board of bank officers. The law as thus construed would act as a prohibition against the purchase of stock by those who owed debts, and they constitute a considerable portion of every community.

[2] New York *ex rel.* v. Purdy, 231 U. S. 371, 58 L. Ed. 274 (1913).

[3] Whitbeck v. Mercantile Bank, 127 U. S. 193, 32 L. Ed. 118 (1888).

holders in national banks of Ohio were entitled to a deduction of their *bona fide* indebtedness under the provisions of the Ohio statute allowing such deductions from credits. The attention of the court in this case does not seem to have been called to the specific definition in the Ohio statute of the "credits" from which deductions were allowed.

But in a later case[1] the court said that the system of taxation adopted in Ohio was not intended to be unfriendly or discriminative against the owners of shares in national banks, for the system was adopted by the State prior to the passage of the Act of Congress, and the shares in national banks were taxed precisely like the shares in State banks.

The discrimination was not illegal, unless it was shown clearly to be in favor of moneyed capital other than that employed in

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[1] National Bank of Wellington v. Chapman, 173 U. S. 205, *supra*. The term "credits" from which deduction for debts is allowed in the Ohio statute is thus defined in the statute (see p. 209):

"The term 'credits' means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay the tax thereon, including deposits in banks, or with persons in or out of the State, other than such as are held to be money as defined in this section, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal *bona fide* debts owing by such person; but in making up the sum of such debts owing, no obligation can be taken into account: (1) to any mutual insurance company; (2) for any unpaid subscription to the capital stock of any joint-stock company; (3) for any subscription for any religious, scientific or charitable purpose; (4) for any indebtedness acknowledged unless founded upon some consideration actually received and believed at the time of making the acknowledgment to be a full consideration therefor; (5) for any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; (6) for any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is in equity bound to pay, etc."

The court refused to consider the report of the auditor of the State showing that the total credits, after deducting debts allowed, amounted to $106,000,000 to $111,000,000, the amounts differing to that extent as presented by counsel, as there was nothing to show that the report had been received in evidence or that there was any finding on the subject.

State or national banks. The term "credits" as defined in the Ohio statute included many subjects which had no possible relation to the business of national banks. It therefore devolved upon the shareholders who complained of discrimination to show how much moneyed capital there was included in the credits from which deductions were allowed, and the record afforded no means of ascertaining that fact. The court said that the case of Whitbeck v. Mercantile National Bank of Cleveland, *supra,* was not an authority adverse to this principle, as the attention of the court in that case was not called to the peculiar terms of the Ohio statute.[1]

Under this decision it is not sufficient that the credits from which deduction is allowed include *some* moneyed capital. There must be some evidence from which the court can determine how much moneyed capital is in fact included, in order to decide whether or not there is a substantial discrimination.

§ 305. **No Discrimination in Deduction of Debts of Unincorporated Banks.**—It was held in this same case that the deduction of debts existing in the business from the amount of moneyed capital belonging to a banker or unincorporated State Bank is necessary for the determination of the real value of the capital that is employed in the business, and is equivalent in its results to the system employed in the case of incorporated State banks and national banks. As long as the deduction is allowed to the debts existing in the business only and not to general debts disconnected with the business, there is no discrimination. The court said, at page 216:

"Thus in both incorporated and unincorporated banks the same thing is desired, and the same result of assessing the value of the capital employed in the business, after the deduction of the debts incurred in its conduct, is arrived at in each case as nearly as is possible, considering the difference in manner in which the moneyed capital is represented in unincorporated banks as compared with incorporated banks which

[1] For recent decisions involving the Ohio law, see Lander v. Mercantile Nat. Bank of Cleveland, *supra,* reversing 45 C. C. A. 666, and Cleveland Trust Co. v. Lander, 62 Ohio St. 266.

have a capital stock divided into shares. That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality we think is reached under this system. So far as this point is concerned, it is entirely plain there is no discrimination between unincorporated banks and bankers on the one hand and holders of shares in national banks on the other.'"[1]

§ 306. **Discrimination Through Failure to Assess Other Moneyed Capital.**—Efforts to resist payment of taxes upon national bank shares, on account of the common failure of taxing authorities to reach intangible personal property for taxation, have proved unsuccessful. Such failure growing out of the inherent difficulties of enforcing such taxation, does not constitute an intentional discrimination within the meaning of the Act of Congress, for the difficulty is not in the State statute nor in its intentional administration. There must be a substantial showing in any event that the property escaping taxation is capital competing for business with the national banks, not merely a general averment of a legal conclusion. Facts must be stated, so that the court can determine as to the taxable character of the property which it is claimed is exempted.[2]

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[1] The Supreme Court of Nebraska reached the same conclusion in Bressler v. Wayne County, 32 Neb. 834, and 13 L. R. A. 614, in 1891, where the court construed and applied the decision of the United States Supreme Court in Mercantile National Bank v. New York, 121 U. S. 138, *supra*, overruling the opinion previously reported in the same case, 25 Neb. 468. The court held that the term "credits," as used in the Nebraska statute, from which deduction of debts was allowed was not intended to include any moneyed capital, such as notes or other credits of that character. See also 1st Nat. Bk. v. Turner, 154 Ind. 456, making the same ruling as to the statute of Indiana; and in Virginia, Burroughs v. Smith, 95 Va. 694, and People's Nat. Bk. v. Marye, 107 Fed. 570. But see Newport v. Mudgett, 18 Wash. 271, distinguishing 1st Nat. Bk. of Aberdeen v. Chehalis Co., and Nat. Bk. of Com. of Seattle v. Seattle, *supra*, p. 320, and holding the deduction of debts from the assessed value of national bank shares required under the State constitution.

[2] Aberdeen Bank v. Chehalis County, 166 U. S. 440, *supra;* Primm v. Fort, 23 Tex. Civ. App. 605.

§ 307. **Tax Upon Deposits Not Discriminative.**—The semi-annual tax imposed upon interest-bearing deposits in national banks, which the bank paid upon the basis of average deposits, charging the same to the depositors and thereby relieving the latter from the necessity of making any return, did not discriminate unfairly against national banks where, under the State laws, the State banks paid a franchise tax at substantially the same rate upon the average amount of deposits, after deducting deposits in excess of $2000.00, upon which the depositors are taxed locally, depositors being exempted from taxation upon those deposits which enter into the calculation of the average.

The ruling of the highest State court that this tax, which the bank could pay and charge to depositors, was laid upon the depositor and not upon the bank, was conclusive upon the Federal Supreme Court, when testing by writ of error from the State court, the validity of the statute.[1]

§ 308. **Discrimination Must be Substantial.**—Whatever be the character of the discrimination, it must be substantial, so as to constitute an effective violation of equality of taxation upon national bank stock as compared with other and competing moneyed capital.[2] As shown *supra,* Sec. 268, the fact that the tax illegally imposed is no greater in amount than a legal tax would be constitutes no defense, so that form as well as substance may be material in determining the validity of the tax.

Thus in Wisconsin, where State banks were required to pay a semi-annual State tax of three-fourths of one per cent on the amount of the capital stock, regardless of the fact whether the capital was invested in United States securities or whether it had been lost in business or not, the court held that it was in effect

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[1] Clement National Bank v. Vermont, 232 U. S. 120, 58 L. Ed. 147 (1913).

[2] Lionberger v. Rowse, 9 Wall. 468, *supra;* Richards v. Town of Rock Rapids, 31 Fed. 505.

a franchise tax, and therefore a fair equivalent to that imposed on the shares of stock of national banks.[1]

The revenue law of Kentucky, imposing a tax on bank stock of fifty cents on each share equal to one hundred dollars of stock, was held valid as to national banks,[2] because the tax was clearly intended to be at the rate of fifty cents per one hundred dollars or one-half of one per cent on the share, whatever the par value of the stock.

§ 309. **A Difference in Taxation Not Necessarily Discriminative.**—Discrimination against national banks forbidden by the United States law does not necessarily result from the adoption by a State of a different method of taxation with reference to national banks from what it has adopted for State banks. The retroactive provision of the Kentucky act of March 21, 1900, relating wholly to national banks, such banks being charged with the liability for taxes for the past year on their capital stock, whether they are held within or without the State, and subject to a penalty in addition for delinquency, was held to operate as a discrimination against such banks, prohibited by the United States statute.[3]

§ 310. **Resident and Non-resident Shareholders.**—While the retroactive features of the Kentucky act of March 21, 1900, making it the duty of certain officers of each national bank to list its shares for taxation and requiring the bank to pay the tax, a penalty for delinquency, did not, so far as the shares of the resident shareholders were concerned, operate against the bank contrary to the statute, nor involve the want of due process of law, although the shareholders and the number of shares might not be the same as when the liability to taxation arose, where such statute is construed by the State courts as not imposing any new liability upon the domestic shareholders of the

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[1] Van Slyke v. The State, 23 Wisc. 655; Bagnall v. The State, 25 Wisc. 112, affirmed in 154 U. S. 581.

[2] National Bank v. Commonwealth, 9 Wall. 353, *supra*.

[3] Covington v. First National Bank, 191 U. S. 100, 49 L. Ed. 963 (1905), affirming 129 Fed. 792.

bank, but is simply providing another method for the assessment of shares which have escaped taxation, because not listed for taxation, only the non-resident shareholders could complain of the supposed invalidity of these provisions as to them.[1]

§ 311. **Difference in Rate of Taxation Not Necessarily Discriminative.**—The statute forbids discrimination between national and State banks or in favor of other moneyed capital in the hands of private individuals, but it does not prohibit a difference in rate between national banks under different circumstances, provided State banks and competing moneyed capital are treated in the same way. Thus the statute of Pennsylvania provided that, where any bank collected from its shareholders a tax of eight mills on the dollar upon the par value of its shares and paid the same into the State treasury, its shares and so much of its capital and profits as should be invested in real estate should be exempted from local taxation; but if any national bank failed to collect the tax of eight mills on the dollar upon the par value of its shares, it must then make a return showing the full number of shares of capital stock issued by it and the actual value thereof, which should be assessed for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens, that is to say, at the rate of four mills on the dollar of the actual value thereof. Thus if the bank had a large surplus and its stock was in consequence worth several times its par value, it would naturally elect to pay the eight mills, and thus in fact pay at a less rate on the actual value of its stock than a bank without a surplus whose stock was only worth par. The court held that this was no violation of the National Banking Act.[2] It was urged that there was discrimination, because, in case the State banks did not elect to pay the eight mills, the State would look to the stockholders directly for the regular four mills tax; whereas as to national banks it would reach the stockholders through the bank itself, and hence some shareholders in State

[1] Citizens National Bank v. Kentucky, 217 U. S. 443, 54 L. Ed. 832 (1910).

[2] Merchants' & Manufacturers' Bank v. Pennsylvania, 167 U. S. 461, *supra*.

banks might escape taxation. But the court said that this was a mere matter of procedure and did not affect the validity of the law.

§ 312. **Equality of Taxation Requires Equality in Valuation as in Rate of Taxation.**—It is obvious that inequality in taxation is effected as surely through difference in valuation by the assessors as by difference in the rate of taxation imposed by law. Such inequality between the assessment of national bank shares and other competing moneyed capital involves a discrimination in violation of the Act of Congress. This principle has been applied in several adjudged cases and the rule established that the inequality, to constitute discrimination, must be something more than sporadic and occasional, must in fact be habitual and intentional, so as to constitute a rule of conduct.

Thus the Supreme Court said in a New York case:[1]

"This *valuation*, then, is part of the *assessment* of taxes.

"It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall it be not greater than *the rate assessed* upon other capital? We see that Congress had in its mind an *assessment*, a *rate* of assessment, and a *valuation;* and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital."

In an Ohio case it appeared that the city of Cleveland generally assessed bank shares higher than other personal property, and that this was not a mere occasional incident, but a rule of conduct deliberately adopted. The tax on national bank shares was about sixty per cent of its real value greater than that on other moneyed capital.[2]

§ 313. **Supreme Court on Assessors' Practice of Valuation.**—In another Ohio case from Toledo, it appeared that a rule of valuation had been established by the assessors, whereby ordinary

[1] People v. Weaver, 100 U. S. 539, l. c. 545, *supra.*

[2] Pelton v. National Bank, 101 U. S. 143, 25 L. Ed. 901 (1880).

personal property was assessed at about one-third of its actual value, money or invested capital at three-fifths of its actual value, while the assessment of shares of incorporated banks was fully equal to their selling price and true value in money. It was said that while the constitution and statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to taxation, yet it is a matter of common observation that in the assessment of real estate this rule is habitually disregarded.[1]

The opinion concluded, l. c. p. 163:

"And while it may be true that there has not been in other States such concerted action over a large district of country by the primary assessors in fixing the precise rates of departure from actual value, as is shown in this case, it is believed that the valuation of real estate for purposes of taxation rarely exceed half of its current salable value. If we look for the reason for this common consent to substitute a custom for the positive rule of the statute, it will probably be found in the difficulty of subjecting personal property, and especially invested capital, to the inspection of the assessor and the grasp of the collector. The effort of the land owner, whose property lies open to view, which can be subjected to the lien of a tax not to be escaped by removal, or hiding, to produce something like actual equality of burden by an undervaluation of his land, has led to this result. But whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property around which the constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied so far as the judicial power can give remedy."

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[2] Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903 (1880). Chief Justice Waite dissenting. As to the presumption of violation of official duty in such cases, see comments on this opinion in New York *ex rel.* v. Barker, 179 U. S. 279, l. c. 286, 45 L. Ed. 190 (1900), affirming 158 N. Y. 709. But it was held in Texas, Engelke v. Schlenker, 75 Tex. 559, that the legality of the assessment of a tax upon the property of a national bank which does not exceed its true value cannot be affected by the custom of the assessor to assess other property at a uniform valuation less than its true value.

§ 314. **Inequality Must be Intentional and Habitual.**—In both these Ohio cases injunctions were granted, complainants having paid into court the amount admitted to be due. This principle that inequality in valuation constitutes discrimination has been followed, but with the qualification already noted, that it must affirmatively appear that the inequality is intentional and habitual. Thus in a New York case, where the assessors had adopted the plan of valuing bank shares at par,[1] and an action at law had been brought to recover taxes alleged to have been illegally collected, the court held that the testimony did not warrant the inference that there was an habitual assessment of national bank shares at a higher rate than other moneyed capital, and commented on the assessment at par as follows, l. c. p. 548:

"A different method might have led to perplexing difficulties, owing to the great fluctuations to which shares in banking institutions are subject, their value depending very much on the skill and wisdom of the managers of those institutions. Intelligent men constantly differ in their estimate of the value of such property, and the stock market shows almost daily changes. Presumptively the nominal value is the true value, any increase from profits going, in the natural course of things, in dividends to the stockholders. This method, applied to all banks, national and State, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation; it cannot be considered as discriminating against either. Both are placed on the same footing." . . .

It was said that the proper remedy in such a case, if relief was not afforded by the State revising boards, was by application to a court of equity to restrain the collection of the excess upon payment or tender of what was admitted to be due.

In another Ohio case it appeared that other moneyed capital was valued on a sixty per cent basis and bank shares at a rate of sixty-five per cent, and the collection of the excessive five per cent was restrained.[2]

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[1] Stanley v. Supervisors of Albany, 121 U. S. 535, *supra*. See also as to procedure, Williams v. Supervisors, 122 U. S. 154, *supra*.

[2] Whitbeck v. Mercantile National Bank of Cleveland, 127 U. S. 193, *supra*.

In a case from Illinois, where it appeared that the assessments were partial, unequal, unjust, and lacking in uniformity, but that there was no intentional discrimination against national banks, it was said as to the New York and Ohio cases above cited:[1]

"It is held in these cases that when the inequality of valuation is the result of a statute of the State designed to discriminate injuriously against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule of principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject."

§ 315. **Mere Mistake in Judgment No Discrimination.** — The rule of the Kimball case was applied by the United States Circuit Court for the Southern District of Ohio,[2] where it appeared from the testimony that there was a general understanding at a meeting of the assessors from all parts of the State, that real estate should be assessed at two-thirds to three-fourths of its value; and there was evidence tending to show great inequality in valuations of all kinds of personal property, including shares of national banks, which were valued at about 86.7 per cent, a higher rate than that at which other personal property was taxed. But it did not appear that this arose otherwise than from a mistake in judgment. The court said, at p. 375:

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[1] National Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469 (1881). See also First National Bank of Chicago v. Farwell, 7 Fed. 518; Stanley v. Board of Supervisors, 15 Fed. 483; Exchange National Bank v. Miller, 19 Fed. 372; First National Bank of Toledo v. Lucas County, 25 Fed. 749; First National Bank v. Lindsay, 45 Fed. 619; Lacy v. McCafferty, 215 Fed. 352.

[2] Exchange National Bank v. Miller, 19 Fed. 372.

"It would, perhaps, be more exact to say that the judgment of the assessors, in their official valuation, differs from the judgment of witnesses in their unofficial valuation, as expressed in their testimony. The differences are no greater than frequently arise between witnesses in cases on trial on questions of value. And there is no certain standard by which the court can determine which is correct. Valuations, excepting of money and of standard marketable articles, are, at best, uncertain. The influences which affect salable values are various and often complicated. Much depends upon who is the owner or vendor, as well as upon who is the purchaser. The shrinkage in the value of estates results in many instances largely from the consideration that the salable value imparted by the fact of the ownership of the deceased is gone. A thousand influences, tangible and intangible, so affect the salable value of property, real and personal, in the city and in the country, as to make its true valuation a work of exceeding difficulty, and it is not to be wondered at, nor is it a circumstance of itself warranting an appeal to a court of chancery, that there are great inequalities in valuations for taxation. To correct these the State has provided for appeals to appropriate tribunals, whose duty it is to equalize valuations and the burden of taxation. When these are exhausted all that can be done, practically, is done, excepting in cases of intentional discrimination."[1]

§ 316. **Formal Resolution Not Necessary for Intentional Discrimination.**—But it is not necessary that the intention of the assessors to discriminate should be proved by formal resolution to that effect.

In another case in Ohio, in the Northern District,[2] it was said that there was nothing in the Kimball case which modified the principle declared in the Cummings and Pelton cases. While inequality of valuation arrived at by an erroneous mathematical

[1] The mere fact that there is a different mode of taxing moneyed capital in savings banks and other corporations from that employed in the case of national banks is not enough to show discrimination. Richards v. Rock Rapids (Iowa), 31 Fed. 505. The court said that, if the total burden of taxation upon the property of the State bank was substantially equal to that upon the national bank, there was no ground to complain.

[2] First Nat. Bank of Toledo v. Lucas County, 25 Fed. 749.

calculation will not justify equitable relief any more than a result reached by the imperfect process of human judgment, yet, where the evidence shows upon its face that there is a systematic rule which necessarily discriminates, a court of equity has jurisdiction to relieve. It appeared in this case that there was a tacit understanding that all personal property should be valued at six-tenths of its actual value, but national banks were assessed at a larger per cent. The collection of the excess was restrained, although the assessment was imposed by the State Board of Equalization in the attempt to equalize national banks *inter sese* throughout the State. It seems that the average rate for national banks was sixty-eight per cent, while that of the State banks was fifty-nine per cent. The court added at p. 757:

"Certainly, the conspicuous and intelligent officials constituting this State Board of Equalization understood, as we do, that inequalities and discriminations were the necessary outcome of their 'rules;' and they found their justification, no doubt, and not unnaturally, in the decision of the State Supreme Court that, as long as they kept below the *'true value in money'* in all cases, there was no violation of the constitution and laws of the State of Ohio, and discriminations were immaterial. But they certainly overlooked the Act of Congress as interpreted by the Supreme Court of the United States. For, although their action in the premises did not necessarily, nor in fact, result in taxing any national bank at a valuation higher than its true value in money, as shown by the bank's own return, or, perhaps, not higher than its true value in money as shown by the selling price in the market, it did result, as we can see in a general way, if we take the State of Ohio as the unit of locality in assessing the national banks, on the average, higher than the 'other moneyed capital' invested in State banks."[1]

§ 317. **A California Discrimination in Valuation Held Discriminative.**—That the intentional and habitual discrimination in the valuation of the shares of national banks as to other moneyed capital is unlawful was clearly shown in the decision of the Supreme Court that the assessment in California of the

[1] See Ch. XVI on Equal Protection of the Laws in Valuation of Property for Taxation.

stock of national banks at their market value, while the assessment of State banks and other moneyed corporations did not include all the intangible elements of value which is part of the market value of the shares of stock, was unlawful and discriminative.[1]

The court said that the general market value of stock is its true cash and selling value, and this necessarily included all the indirect and intangible elements of value which entered into an estimate of the worth of the stock; and it was said further that if the statutes of California compelled the assessing officers in the valuation of the property of State banks to include all of the elements of value, the discrimination that the court found now to exist would disappear.

§ 318. **Difference in Valuation of Different Classes of Personalty Not Necessarily Discriminative Against National Banks.**—The difficulty in reaching for taxation intangible personal property has led to the adoption in the State of Maryland of a system of valuation of bonds and certificates of indebtedness, adjusted upon a sliding scale according to the rate of interest to be paid. Thus bonds bearing six per cent interest are assessed at fifty per cent of their face; those bearing five per cent at forty-one and two-thirds of their face, and so on. It was

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[1] San Francisco National Bank v. Dodge, 197 U. S. 70, 49 L. Ed. 669 (1905), reversing the Circuit Court of Appeals of the 9th Circuit, which had affirmed a decree of the Circuit Court for the Northern District of California dismissing the bill to restrain the enforcement of taxes on the shares of stock of National Banks, Chief Justice Fuller and Justice Brewer, Brown and Peckham dissenting. This dissent seems to have been based not upon the principle as to discrimination in valuation being unlawful, but as to the construction of the statute by the California Court and as to the jurisdiction of equity over the cause.

The California statute was construed by the Circuit Court of Appeals of the 9th Circuit in Nevada National Bank v. Dodge, 119 Fed. 57, where it was held that the State statute was valid, and that it was immaterial that the State tax the property instead of the shares of State banks as the assessment did not appear to be higher in fact. The question of discrimination in valuation decided by the Supreme Court does not seem to have been raised.

urged by a national bank that certain private bankers, whose business was in competition with national banks, were investing their capital in these securities, thus obtaining an advantage over national banks which were assessed at their full valuation equally with other property and with State banks and trust companies. The United States Circuit Court of Appeals[1] held that there was no discrimination within the meaning of the Act of Congress.

The court said that the term "moneyed capital" as used in the Act of Congress had a restricted meaning, and the fact that some property, not shown to be an appreciable portion of the whole, escaped taxation furnished no ground of relief. That the taxation of personal property had always been a vexatious question, as the great mass of personal property which could be readily hidden escaped the eyes of the assessor, and nothing was more conclusively settled by human experience than that it is impossible to collect taxes upon this kind of property with any reasonable approach to accuracy and equality. Widows and orphans and trustees and guardians and others who had the least experience in business and were the least able to bear it, were compelled to carry the burden, while those who were most ingenious in evasion escaped taxation, and extensive evasion and downright perjury was the result. The court said that the law-makers had adopted a scheme for bringing hoarded wealth from hiding by a promise of taxation at a rate which would not be practically confiscatory, and a large amount had been returned, and the question was whether the valuation of this property for the purpose of taxation at thirty cents on the hundred dollars worked such a discrimination against the national banks, that the courts would be compelled to declare the legislation void. The court concluded that this legislation was not inspired by any spirit of hostility to national banks, but to meet an emergency, and did not fall within the inhibition of the Act of Congress.

§ 319. **Taxation of Real Estate of National Banks.**—The real estate of national banks wherever located, whether in the

[1] National Bank of Baltimore v. Baltimore, 40 C. C. A. 254, 100 Fed. 24.

State of the bank's location or elsewhere, is taxable like other real estate. As already pointed out, there need be no deduction from the value of the shares of national banks on account of the value of real estate located and taxed in other States, *supra*, Sec. 289. There is no provision in the Act of Congress requiring the deduction of the valuation of real estate located in the State of the location of the bank from the valuation of the shares. Where the laws of the State require the appraised value of the real estate of corporations to be deducted from the actual value of the shares before they are listed for taxation, national bank shareholders are entitled to the same deduction, and the denial of this right would be not only violative of the Act of Congress, but a denial of the equal protection of the laws.[1] It has been held in a number of State courts construing the laws of those particular States, that the assessed value of the real estate must be deducted from the valuation of the shares. Thus the Court of Appeals of Maryland[2] decided that the State can tax the real property or the shares of stock of a national bank but not both. The court said that it is not a mere metaphysical subtlety to say that the corporate property is represented by the shares of stock, and that it is substantially true that the taxes assessed on the property of the corporation are in reality paid by the shareholders and paid by them directly.[3]

It was held in Indiana, where the statute directed that the realty and its value deducted from the capital stock, the shares of which must then be taxed to the holders, that the bank could not recover the taxes paid on its realty on the ground that the value of the realty had not been deducted from the capital stock,

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[1] City National Bank v. Paducah, U. S. Circuit Court of Kentucky, 1 National Bank Cases 300.

[2] County Commissioners of Frederick County v. Farmers' & Mechanics' Bank, 48 Md. 117.

[3] On this point that double taxation of banks is effected by taxing both property and stock, see New Haven v. City Bank, 31 Conn. 106; Nichols v. N. H. & N. Co., 42 Conn. 103; People *ex rel.* v. Tax Commissioners, 69 N. Y. 91; Citizens' National Bank v. Loftin, 85 Ind. 341. But *contra*, upholding the right of double taxation, see City of Memphis v. Bank, 6 Baxter 415; Macon v. First National Bank, 59 Ga. 648.

for the wrong in not making the deduction was done to the stockholders and not to the bank.[1]

In New York,[2] the State court, construing the New York statute, held that the assessor must deduct from the actual value of each share the sum bearing the same proportion thereto, as the assessed value of the real estate of the bank bore to the actual, rather than the nominal, value of the capital stock.[3]

In other States it has been held that, where the statute requires the shares to be taxed at their actual value without deduction for the real estate, this includes the taxation of the realty, which is accordingly exempt from unequal separate assessment.[4]

§ 320. **Double Taxation of National Banks.** — These decisions of the State courts, however, denying the right of double taxation by taxing the bank shares without deduction for the assessed value of the real estate, are based upon State laws. If the State allows the double taxation of other moneyed capital invested in corporate shares, through the taxation of both the corporate shares and corporate property, there is no prohibition in the National Banking Act requiring the deduction of the value of the real estate so as to avoid double taxation in the case of national banks.[5] There is no discrimination in double taxation if all of the same class are subject to it.

The Act of Congress protects against double taxation, as already shown, in the case of shares held by non-residents, by pro-

[1] Board of Commissioners v. First National Bank, 57 N. E. Rep. (Ind.) 728.

[2] People *ex rel.* v. Tax Commissioner, 69 N. Y. 91.

[3] The statute in this case provided for deducting "from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank to the whole amount of the capital stock of the said bank."

[4] Board of Commissioners of Rice County v. Faribault, 23 Minn. 280. See also Lackawanna v. National Bank, 94 Pa. 221; County of Lancaster v. Lancaster County National Bank, Common Pleas of Pennsylvania, 2 National Bank Cases 415.

[5] People's National Bank v. Marye (Cir. Ct. Va.), 107 Fed. 570, the court saying that this seemed to be the view of the Supreme Court in National Bank v. Commonwealth, 9 Wall. 353, l. c. 358, *supra.*

viding that such shares cannot be taxed in the State of the owner's domicil, but only at the location of the bank. There is no protection, however, against the incidental double taxation growing out of the ownership by the bank of the real estate located in other States. The value of such real estate is included in the valuation of the shares of the bank, and is also assessed for taxation in the States where situated.

§ 321. **Enforcement of Tax.**—Where the bank is made the statutory agent of the shareholders for the payment of the tax and the duty imposed upon it to pay the whole tax to the State, reimbursing itself from the shareholders, it has been held that the State may enforce the collection of the tax from the bank by the methods employed in other cases, *supra*, Sec. 269.

Where the assessment is against the shareholder personally, without any statutory right to enforce payment from the bank, the State may employ the same remedies against the shareholders as against other delinquents in the payment of personal property taxes. Thus a stockholder in a national bank is bound to take notice of the time appointed by the statute for the hearing of complaints in regard to assessment of bank stock; and the proceeding by which the valuation is determined, though it may be followed, if the tax is not paid, by a sale of the delinquent's property, is due process of law.[1] Where the State statute authorizes not only distress and sale of personal property, but fine for misconduct for the non-payment of the personal property tax, such statute may be enforced against the delinquent national bank stockholder.[2]

The invalidity of the provision of a State statute providing for the taxation of national banks as applied to a certain class of stockholders in violation of the Federal law, was held not to warrant an injunction, restraining the collection of the tax imposed thereunder on the stockholders of the bank, where the bill filed

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[1] Merchants' Bank v. Pennsylvania, 167 U. S. 461, *supra*.

[2] Palmer v. McMahon, 133 U. S. 660, 33 L. Ed. 772 (1890), affirming 102 N. Y. 106; see *infra*, Sec. 331. As to subjecting non-resident owners of shares in national banks to personal liability, see City of New York v. McClean, *infra*, Sec. 398.

did not show the amount which was invalid, or the payment or the tender of the part lawfully imposed.[1]

§ 322. **Visitorial Power of State Over National Banks.**— The State has the power to require the cashier of a national bank to furnish to the designated official a true list of the names of shareholders and the number of shares.[2] The court said that the national banks are subject to State legislation, except where such legislation is in conflict with some Act of Congress, or where it tends to destroy or impair the utility of the banks as agencies of the United States, or interfere with the purposes of their creation. It was no objection to such a law that the Act of Congress requires the national bank to keep a list of its stockholders posted up in its business office. The State has the right to pass such a law for the purpose of enforcing its taxation of the shares. It was objected that the purpose of the act was to enable the towns of residence of the shareholders to tax them, and that this was invalid under the Act of Congress as it then stood. The court replied it could not determine that question until it was properly raised through an attempt to collect such a tax.

It is provided by the National Banking Act, Sec. 5241, that the banking associations shall not be subject to any visitorial powers other than such as are authorized by the act or are vested in the courts of the country. It was held in the United States Circuit Court of Ohio[3] that this section did not warrant an injunction against a proceeding under the State law of Ohio, in which the cashier was directed to produce the deposit books of the bank so that it could be ascertained whether any person had, at the date of assessment for taxation, any money on deposit subject to taxation in the county, which had not been returned by the owner for that purpose.

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[1] Charleston National Bank v. Melton, 171 Fed. 743.

[2] Waite v. Dowley, 94 U. S. 527, *supra.*

[3] First National Bank v. Youngstown v. Hughes, 6 Fed. 737. But in a prior case between the same parties an injunction seems to have been allowed, see First National Bank of Youngstown v. Hughes, 2 Nat. Bank Cases 176.

§ 323. **The Remedy by Injunction.**—Although the taxes may be levied upon the shareholders of a bank, the bank is nevertheless a party in interest, especially where it is made liable for the tax, and is therefore entitled to litigate in its own name the validity of the tax against its stockholders. The right to proceed in equity when such remedy is given by the State statute is clear[1] and irrespective of the State statute, where the right to proceed in equity is given under the rules concerning the remedy in equity for illegal taxation in the Federal courts.[2]

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[1] Lander v. Mercantile National Bank of Cleveland, 118 Fed. 785, affirming 109 Fed. 21.

[2] See *infra*, Sec. 531.

See Cummings v. Bank, 101 U. S. 153, *supra;* San Francisco National Bank v. Dodge, *supra.*

CHAPTER X.

THE FOURTEENTH AMENDMENT.

§ 324. Occasion and immediate purpose of amendment.
325. Slaughter House Cases.
326. Privileges and immunities of citizens of United States.
327. Construction of amendment.
328. Amendment applies only to State action.
329. Protection not limited to citizens.
330. Corporations are "persons" under Fourteenth Amendment.
331. "Any person" and "any person within the jurisdiction" distinguished.
332. Application of amendment to State taxation.
333. Justice Field on Fourteenth Amendment and State taxation.
334. Circuit Judge Jackson on Fourteenth Amendment and State taxation.
335. "Due process of law" and "the equal protection of the laws" distinguished.
336. Jurisdiction over State courts under the Amendment of 1914.
337. Substance and not form regarded in alleged violations of Fourteenth Amendment.
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AMENDMENT XIV TO U. S. CONSTITUTION

Proposed, June 16, 1866. Declared ratified, July 28, 1868.

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

§ 324. **Occasion and Immediate Purpose of Amendment.**—The restraints upon the State power of taxation discussed in the preceding chapters have been those growing out of the relation of the State to the Federal government, created by the Con-

stitution of the United States. Prior to 1868 there was no guaranty in the Federal Constitution of due process of law or the equal protection of the laws to the people of the States, except as against the power of the Federal government. Thus the first eight of the amendments, known as the Federal Bill of Rights, which were adopted immediately upon the ratification of the Constitution, having been made an implied condition of ratification in some of the States, have been uniformly construed as applying only to the Federal government and not to the States. There was then no appeal to the Federal Courts against any violation by State power of equal protection of the laws in taxation, which did not involve an interference with national authority.

The Fourteenth Amendment has been called the child of the Civil War, but it may more accurately be said that it is the offspring of Reconstruction. It was framed by the Joint Reconstruction Committee of Congress in 1866, its ratification was exacted as a condition of the admission of the reconstructed States into the Union, and its adoption was proclaimed under the direction of a joint resolution of Congress during the angry political controversies of 1868.[1] The occasion and immediate purpose of the adoption of the amendment were doubtless the securing the results of the Civil War and protecting, through the national power, the recently emancipated negroes of the South.

The amendment contains in the first section a distinct declaration of what shall constitute citizenship of the United States, and provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. This in effect over-

[1] The validity of the adoption was at first disputed by the minority party in Congress on the ground that certain States had recalled their ratification before the result was proclaimed, and that Congress had no authority to make the ratification a condition of readmission of the reconstructed States into the Union. These questions, however, were never determined. See Miller's Lectures on the Constitution, p. 653. Although many cases have been before the Supreme Court involving the construction of the Fourteenth Amendment, in no one has any question been raised as to its ratification and incorporation in the Constitution.

ruled the decision in the Dred Scott case.[1] Other provisions related to securing the results of the war[2] and to the protection of the national debt from repudiation. In order to protect the newly emancipated race from the action of State governments, it was deemed necessary to extend the guaranty of the Federal Bill of Rights. It was therefore provided that no State shall make or enforce any law which shall abridge or impair the immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Owing to the circumstances attending the adoption of the amendment, the full import and scope of the concluding clause were not immediately realized,[3] and there was a disposition in the Supreme Court at first to limit the application of the guaranties of due process of law and the equal protection of the laws to the protection of the newly enfranchised race against hostile State

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[1] 19 Howard 393, 15 L. Ed. 691 (1857). This case held that persons whose ancestors were members of the African race imported into this country and held as slaves could not, though emancipated, or born of parents who were free, become citizens of a State in the sense in which that word was used in the Constitution of the United States.

[2] See also *infra*, Sec. 560.

[3] Thus Judge Cooley, in the first edition of his "Constitutional Limitations," published soon after the adoption of the amendment, says, p. 294: "The most important clause in the Fourteenth Amendment is that part of Section 1 which declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. This provision very properly puts an end to any question of the title of the freedmen and others of their race to the rights of citizenship; but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State constitutions. But as a principle of State constitutional law has now been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by State laws is complained of, inasmuch as the decisions of the State courts upon laws which are supposed to violate it will be subject to review in that court on appeal."

legislation. Comparatively few cases however, have been presented wherein these guaranties have been invoked for the protection of the class for whose benefit they were primarily intended. The gradual judicial recognition, as shown in the opinions of the Supreme Court, of the broad scope of these provisions of the Fourteenth Amendment in the protection of all persons, white as well as colored, corporate as well as individual, against any discriminating legislation, is a notable illustration of the developing power of our jurisprudence.

§ 325. **Slaughter House Cases.**—The amendment was first brought before the Supreme Court, in the Slaughter House Cases, in 1873, wherein an act of the State of Louisiana granting the exclusive right for twenty-five years to maintain slaughter houses in New Orleans was attacked as a monopoly, which, it was claimed, violated the privileges and immunities of citizens of the United States, and deprived them of their liberty and property without due process of law. The court, in a notable opinion by Justice Miller,[1] held that the privileges and immunities of citizens of the United States, not those of citizens of the State, are protected by the amendment, and that the privileges and immunities thus protected are those which arise out of the nature and essential character of the national government. The argument had not been much pressed in the cases, that the charter deprived the plaintiffs of their property without due process of law, or that it denied to them the equal protection of the laws. The court said as to the guaranties of the amendment, page 80:

"The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government."

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[1] 16 Wall. 36, 21 L. Ed. 394 (1873). Chief Justice Chase and Justices Field, Swayne and Bradley dissenting.

As to the equal protection of the laws, it was said, l. c. 81:

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

"If, however, the State did not conform their laws to its requirements, then by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment."

In a later case from West Virginia, where the Fourteenth Amendment was invoked by a colored man on account of discrimination against negroes in the summoning of jurors, the court referred to the opinion in the Slaughter House Cases, saying:

"If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally to carry out the purpose of its framers."[1]

§ 326. **Privileges and Immunities of Citizens of United States.**—As will be seen from the opinion in the Slaughter House Cases, the far-reaching importance of the last clause of the first section of the amendment, relating to "due process of law" and the "equal protection of the laws," was not then realized, nor were these provisions really involved in the question before

[1] Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1880).

the court, which turned essentially upon the meaning given to the term "privileges and immunities of citizens of the United States." What these are has not been definitely decided, although in subsequent cases this ruling has been adhered to. It was said in one case[1] that they are the privileges and immunities arising out of the nature and essential character of the Federal government and granted or secured by the Constitution of the United States. It has been strongly urged that they include the rights guaranteed by the first eight amendments of the Constitution which prescribe limitations to Federal power, such as the guaranty of the right to trial by jury and the securities against unreasonable searches and seizures, compulsory self-incrimination, quartering soldiers on the people in time of peace, excessive bail and cruel or unusual punishments. It has been said that if the rights of Federal citizenship include only those protected by the express and implied guaranties of the Constitution, such as free access to the seat of government, the right to the protection of the government on the high seas or in foreign parts and the right to use the navigable waters of the United States, that these rights are all protected against hostile State action and do not require the guaranty of this amendment. Thus Judge Cooley remarks:[2]

"It may well be questioned whether the provision just considered was necessary. It is certainly not clear that there can exist any privilege or immunity of a citizen of the United States which, independent of the Fourteenth Amendment, is not beyond State control."

But he adds that the provision has its importance in the fact that it embodies in express law what before, to some extent, rested in implication merely.[3]

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[1] Duncan v. Missouri, 152 U. S. 377, 38 L. Ed. 485 (1894), and cases cited.

[2] Principles of Constitutional Law, 247.

[3] In O'Neil v. Vermont, 144 U. S. 361, 36 L. Ed. 465 (1892), Mr. Justice Field said in the dissenting opinion, concurred in by Justices Harlan and Brewer, that after much reflection he thought that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States;

§ 327. **Construction of Amendment.**—But the distinction between the privileges and immunities of the citizens of the State and those pertaining to national citizenship is not material in the consideration of the limitations upon the State's taxing power under this amendment.

The Fourteenth Amendment creates no rights; it only extends the guaranty of Federal protection to the rights already existing, whatever their origin, whether created by the State or not. All property rights whatsoever are protected by the guaranty of due process of law and the equal protection of the laws. The comparative importance of the provisions of this first section of the Fourteenth Amendment is illustrated by the fact that comparatively few cases have come before the Supreme Court on the question of the distinction between State and Federal citizenship, while the docket has been crowded with those involving the questions of due process of law and the equal protection of the laws. Only five years after the Slaughter House decision Justice Miller in delivering the opinion of the court[1] contrasted the "due process of law under the Fifth and Fourteenth Amendments," saying:

"It is not a little remarkable, that while this provision (due process of law) has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of

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that the rights of persons declared or recognized in the amendments are rights belonging to them under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon State power by ordaining that no State shall make or enforce any law which would abridge them. In this connection see the argument by John Randolph Tucker in the case of the Chicago Anarchists, Spies v. Illinois, 123 U. S. 131, 31 L. Ed. 80 (1888), and an interesting discussion by Mr. W. B. Guthrie in his lectures on the Fourteenth Amendment, pp. 62 to 65.

[1] Davidson v. New Orleans, 96 U. S. 97, 103, 24 L. Ed. 616 (1878).

this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law."

During the nearly forty years that have passed since these words were written, as the volumes of the court's opinions will show, not a term has passed in which some question involving due process of law or the equal protection of the laws has not been before the court for adjudication.

§ 328. **Amendment Applies Only to State Action.**—It has been uniformly held that the prohibitions of the Fourteenth Amendment are addressed only to the States, and have no reference to *individual* invasion of private rights. It is under this amendment as under the clause of the Constitution prohibiting State impairment of the obligation of contracts, the Federal law can be invoked only where the action complained of is by the State or under State authority.

But while this is true, yet the protection can be obtained, not only against the political body called a State, but against any agency thereof, against any organization, association, official or individual acting under State authority. Thus the Supreme Court said:[1]

"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

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[1] *Ex parte* Virginia, 100 U. S. 339, 347, 25 L. Ed. 676 (1880).

The prohibitions of the amendment refer to all the instrumentalities and authorities of the State. Thus a municipal ordinance enacted under legislative authority has the force of law in the municipality, and is therefore State action within the prohibition of the amendment. Whatever the agency, where one acts in the name of or for the State, his act is that of the State.

This does not mean however, that an erroneous decision of a State court, whereby the unsuccessful party loses his property, deprives him of such property without due process of law, where he has had a full hearing according to the regular course of judicial proceedings.[1]

The same principle applies as in the case of the alleged impairment of contracts, where the court said that the State court might err, in its (the Supreme Court's) opinion, and in its construction or application of the law, but that would give no ground for invoking the constitutional prohibition of impairment of obligation of contract, unless it involved a denial of a Federal right. See *supra,* Sec. 68.

§ 329. **Protection Not Limited to Citizens.**—The broad application of the guaranties of due process of law and the equal protection of the laws is not confined to the protection of citizens, whether considered in relation to State or national citizenship. It extends to all persons, citizens and aliens, our own people and the strangers within our gates. This was the decision of the Supreme Court in a California case,[2] where it was held that Chinamen living in this country under provisions of the treaty were entitled to the protection of the Fourteenth Amendment; and the court said that the provisions guaranteeing due process of law and equal protection of the laws are "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws" to all.

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[1] Central Land Co. v. Laidley, 159 U. S. 103, 40 L. Ed. 91 (1896); Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. Ed. 243 (1887).

[2] Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220 (1887).

§ 330. **Corporations Are "Persons" Under Fourteenth Amendment.**—It was not until 1886,[1] in the case of Santa Clara County v. Southern Pacific Railroad Company,[2] that it was definitely determined by the Supreme Court that corporations are persons within the provisions of the Fourteenth Amendment and are therefore entitled to "due process of law" and to the "equal protection of the laws."

Mr. Chief Justice Waite said:

"The court does not wish to hear arguments on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

In a later case[3] the court said:

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations, any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the laws than it has to individual citizens."

This right of the corporation, whether domestic or foreign, to due process of law and the equal protection of the laws does not

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[1] It had been assumed, however, though not expressly decided, in Railroad Co. v. Richmond, 96 U. S. 521, 24 L. Ed. 734 (1878).

[2] 118 U. S. 394, 30 L. Ed. 118 (1887). This had been already decided in the U. S. Circuit Court of California in an elaborate opinion by Justices Field and Sawyer, 18 Fed. 385, and 9 Sawyer 165, 210. The ruling has been in many cases affirmed: Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650 (1888); Gulf, Colorado & Santa Fe R. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666 (1897), and cases cited; Minneapolis & S. L. R. R. v. Beckwith, 129 U. S. 26, 32 L. Ed. 585 (1889); Charlotte, Etc., R. R. Co. v. Gibbes, 142 U. S. 386, 35 L. Ed. 1051 (1891); Waters Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. Ed. 657 (1890).

[3] 165 U. S. l. c. 154, *supra.*

affect the power of the State to exclude foreign corporations, other than those directly engaged in interstate commerce or in the employ of the Federal government, or to prescribe such conditions by way of license charges or otherwise as it may deem proper to impose upon their admission to do business in the State. But the effect of it is that, when admitted, they are entitled to the protection of these constitutional guaranties equally with others.[1]

§ 331. **"Any Person" and "Any Person Within the Jurisdiction" Distinguished.**—It will be noted that there is a difference in the language of the two prohibitions. A State must not deprive *any* person of life, liberty or property without due process of law, but the clause forbidding denial of the equal protection of the laws is limited to "any person *within its jurisdiction.*" The Supreme Court said[2] that it could not assume that these words "within its jurisdiction" were inserted in this connection without any object, nor was it at liberty to eliminate them from the Constitution and interpret the clause in question as though they were not to be found in that instrument, though it did not attempt to state what is their full import. It held however, that where a Virginia corporation had sold goods to a corporation in Tennessee which subsequently became insolvent, and had never been admitted to do business in Tennessee under conditions subjecting it to process issuing from the courts of that State, the vendor was not under this clause within the jurisdiction of the State of Tennessee, and could not therefore claim the "equal protection of the laws" under the Fourteenth Amendment, in the distribution of the assets of the insolvent purchaser.

§ 332. **Application of Amendment to State Taxation.**—The first application of the amendment to taxation was by the legislative department of the government in the Act of Congress of May 31, 1870, which has ever since been on the statute book as section 1977, Revised Statutes of the United States. The act provides as follows:

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[1] See *supra*, Sec. 178.

[2] Blake v. McClung, 172 U. S. 239, 261, 43 L. Ed. 432 (1899)

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, *taxes, licenses, and exactions of every kind,* and to no other."

This act was passed under the authority of the fifth section of the amendment providing that "Congress shall have power to enforce by appropriate legislation the provisions of this article." It was a constitutional exercise of the power of Congress under the Fourteenth Amendment,[1] as it is directed against State and not individual action. The legislative prohibition, it will be seen, is aimed directly at discriminations against the colored race, declaring that all persons shall be subject to the same taxation as white citizens.

The comprehensive character of the constitutional guaranties and their application to discriminating taxation was first judicially recognized in two notable opinions of Justice Field of the Supreme Court, sitting in the Circuit Court of California, and one by Circuit Judge Jackson, afterwards Justice of the Supreme Court, in the Northern District of Ohio. The first case was a suit brought to recover of the Southern Pacific Railroad Company State and county taxes for the years 1880 and 1881, and the defense was set up that the assessment, under the newly adopted constitution of California, which allowed a deduction from other property for mortgages thereon, but forbade such deduction from railroad property, was an unjust and unlawful discrimination conflicting with the Fourteenth Amendment. The suit was brought in the State court and removed to the United States court. On motion to remand, it was held that the case involved a Federal question, the law at that time permitting a removal by the defendant on that ground.[2] On the trial upon the merits the assessment was adjudged invalid as violative of the Four-

[1] Strauder v. West Virginia, 100 U. S. 303, *supra;* Neal v. Delaware, 103 U. S. 370, p. 385, 26 L. Ed. 567 (1881).

[2] County of San Mateo v. So. Pac. R. R. Co., 13 Fed. 145.

teenth Amendment by Justice Field, Justice Sawyer concurring.[1]

In the following year, another case involving substantially the same question was before the same court.[2] Justice Field, Justice Sawyer concurring, held these assessments invalid in an exhaustive opinion, which is an important contribution to the constitutional law of taxation. This opinion, though delivered on the circuit, is really the foundation opinion concerning the broad construction of the Fourteenth Amendment and its application to discriminating taxation.

§ 333. **Justice Field on Fourteenth Amendment and State Taxation.**—He said:

"The amendment was adopted soon after the close of the civil war and undoubtedly had its origin in a purpose to secure the newly made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the States throughout the broad domain of the republic. A constitutional provision is not to be restricted in its application because designed originally to prevent an existing wrong. Such a restricted interpretation was urged in the Dartmouth College case, to prevent the application of the provision prohibiting legislation by States impairing the obligation of contracts to the charter of the college, it being contended that the charter was not such a contract as the prohibition contemplated. Chief Justice Marshall, however, after observing that it was more than possible that the preservation of rights of that description was not particularly in view of the framers of the Constitution when that clause was introduced, said:

" 'It is not enough to say that this particular case was not in the mind of the convention when the article was framed,

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[1] 13 Fed. 722, 733.

[2] County of Santa Clara v. So. Pac. R. R. Co., 18 Fed. 385, 397. This judgment was affirmed in the Supreme Court but on another point, 118 U. S. 395, the court holding that corporations are persons within the meaning of the Fourteenth Amendment, *supra*. But see opinion of Justice Field in the Supreme Court, p. 422.

nor of the American people when it was adopted. It is necessary to go further and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.' 4 Wheat. 644.

"All history shows that a particular grievance suffered by an individual or a class, from a defective or oppressive law, or the absence of any law, touching the matter, is often the occasion and cause for enactments, constitutional or legislative, general in their character, designed to cover cases not merely of the same, but all cases of a similar, nature. The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race, by special legislation directed against them, moved the framers of the amendment to place in the fundamental law of the nation provisions not merely for the security of those citizens, but to insure all men, at all times, and at all places, due process of law, and the equal protection of the laws. Oppression of the person and spoliation of property by any State were thus forbidden, and equality before the law was secured to all."

After quoting from Mr. Edmunds, who was a member of the Senate when the amendment was adopted by that body, as to the thorough discussion and scrunity to which the language of the amendment was subjected before adoption, the opinion proceeded:

"With the adoption of the amendment the power of the States to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. . . .

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amend-

ment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions. . . . It would, indeed, as counsel in the San Mateo case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were read, as contended it does in law: 'Nor shall any State deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*' No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

The Justice commented on the fact that the Act of Congress[1] expressly provides for equality of taxation, and proceeded:

"The fact to which counsel allude, that certain property is often exempted from taxation by the States, does not at all militate against this view of the operation of the Fourteenth Amendment, in forbidding the imposition of unequal burdens. Undoubtedly, since the adoption of that amendment, the power of exemption is much more restricted than formerly; but that it may be extended to property used for objects of a public nature is not questioned,—that is, where the property is used for the promotion of the public wellbeing and not for any private end."

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[1] See *supra*, Sec. 311.

After stating that property held for religious and educational purposes was property exempted from taxation, he continued:

"Whatever the exemption, it can only be sustained for the public service or benefit received. The equality of protection which the Fourteenth Amendment declares that no State shall deny to any one, is not thus invaded. That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute only his just proportion to the general fund. When such exaction is made without reference to a common ratio, it is not a tax, whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation."

§ 334. **Circuit Judge Jackson on Fourteenth Amendment and State Taxation.**—In the Ohio case,[1] Judge Jackson (later of the Supreme Court) held invalid an ordinance providing for street improvements in the city of Toledo, not only on the ground that it involved the taking of property without compensation first paid to the owner, but also because it authorized a special assessment without notice or opportunity to be heard, which was a taking of property without due process of law. The court declared that the Fourteenth Amendment was intended to place the same limitation upon the power of the State which the Fifth Amendment had placed upon the power of the Federal government, and that the same application was made in the matter of taxation. It is no longer an open question that the provisions of the Federal Constitution, prohibiting the State from depriving any person of his property without due process of law, apply to taxation by the State or by its subordinate agencies, and that, with respect to all such taxes based on values and apportionment and involving judicial or *quasi* judicial ascertainment and determination as to the amount to be imposed upon the citizen or made a charge upon his property, due process of law demands and requires that at some stage in the proceeding, before the tax charge is fixed and made final and collected, he shall have notice or an opportunity to be heard in reference thereto.

[1] Scott v. Toledo, 36 Fed. 385.

§ 335. **"Due Process of Law" and "The Equal Protection of the Laws" Distinguished.**—The requirement of "due process of law" or its legal equivalent "the law of the land," in its broader sense, may include all that is connoted by "equal protection of the laws." One who is injured by arbitrary or class legislation may justly claim that he is deprived of his property without due process of law, and so the term "due process of law" in State constitutions has been held to involve the prohibition of class legislation.[1]

The Supreme Court has not defined either "due process of law" or the "equal protection of the laws." As to the former phrase, it said,[2] l. c., p. 101:

"It must be confessed however, that the constitutional meaning or value of the phrase 'due process of law,' remains today without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States."

Apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there was wisdom in ascertaining the intent and application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision should require, with the reasoning on which such decisions might be founded. The court[3] has recently declared that it had never attempted to define with precision the words "due process of law."

So also the court has declined to define with precision what is the "equal protection of the laws," though it is said that the equal protection of the laws is the pledge of the protection of equal laws.[4] And in a very recent case, holding invalid the anti-

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[1] Sheppard v. Johnson, 2 Humphrey 285; Sutton v. Hate, 96 Tenn. 710.

[2] Davidson v. New Orleans, 96 U. S. 97, decided in 1877, *supra.*

[3] Holden v. Hardy, 169 U. S. 389, 42 L. Ed. 780 (1898), affirming 14 Utah 71.

[4] Yick Wo v. Hopkins, 118 U. S. 356, 369, *supra.*

trust law of Illinois,[1] the court has repeated that both these two guaranties are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government.

But there has been a practical distinction observed in the application of the terms, which for convenience may be followed in analyzing the decisions. Due process of law is required in tax procedure, in the assessment and collection of taxes; and, in a broader sense, the taking of property by taxation under due process of law requires that the tax must be made for a lawful, that is for a public, purpose. On the other hand, the equal protection of the laws involves the question of what is a reasonable *classification* for taxation, in other words, to what extent equality of taxation is protected by the Federal power under the Fourteenth Amendment.

The practical distinction between due process of law and the equal protection of the laws is illustrated in a case in the Supreme Court, which is not however, concerned with taxation. In Cotting v. Kansas City Stock Yards,[2] the act of the State of Kansas, regulating charges in public stockyards and applying only to the defendant corporation and not to other companies or corporations engaged in like business, was adjudged to be in violation of the Fourteenth Amendment. The opinion of Justice Brewer, with whom concurred Chief Justice Fuller and Justice Peckham, was that the unreasonable rates imposed and the extreme and cumulative penalties, constituted a deprivation of property without due process of law; while the remaining six Justices, Harlan, Gray, Brown, White, Shiras and McKenna, concurred only in the second ground on which the decision was based, that the discrimination in the legislation, directed, as it was, against the defendant company alone, constituted a denial of the equal protection of the laws. In other words, the *arbitrary classification* constituted a denial of the equal protection of the laws, and these latter judges expressed no opinion upon the

[1] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679 (1902), affirming 99 Fed. 354.

[2] 183 U. S. 79, 46 L. Ed. 92 (1902), reversing 82 Fed. 850.

point whether the statute by its necessary operation would deprive the company of its property without due process of law.

It would seem, however, that one who is compelled to pay charges which are unlawful, through arbitrary classification, is not only denied the "equal protection of the laws," but is also thereby deprived of his property "without due process of law."

§ 336. **Jurisdiction Over State Courts Under the Amendment of 1914.**—Prior to the amendment to the Judiciary Act, December 13, 1914, it was an anomalous fact, illustrative of the dual sovereignty in our form of government and the complex character of our jurisprudence, that the final determination of questions of the violation of this amendment did not always rest with the Federal courts, although this Fourteenth Amendment protects the citizens under this guaranty of protection against the action of the State government or any one acting under State authority.

Under our judicial system, whereunder the Federal courts in cases of adverse citizenship administer state laws and follow, as a rule, the decision of the State wherein they have jurisdiction, the State courts also, in the lawful exercise of their powers, may decide Federal questions when presented for judgment. Under the original Judiciary Act of 1789, the appellate jurisdiction of the Supreme Court, in reviewing decisions of the highest courts of the states, was limited to cases where the decision was against the Federal right, privilege, or exemption claimed. Where the judgment of the highest court, therefore, was in favor of the party claiming the federal right, the decision of the State court was final and could not be reviewed by writ of error by the Supreme Court. In a number of cases, therefore, arising under the Fourteenth Amendment, prior to this amendment of the Judiciary Act in 1914, decisions of State courts have been rendered, sustaining the claim of Federal right or exemption, and judging State statutes to be invalid; and these decisions were final within that jurisdiction.

An interesting illustration of this jurisdiction of the State courts, is found in the decision of the Supreme Court of Mis-

souri,[1] that a constitutional amendment duly ratified by the people, adopting what is known as the California plan of taxing mortgages as a part of the real estate, allowing a deduction of the value of the mortgage to the owner, except in case of railroads, was violative of the Fourteenth Amendment because the exemption was an arbitrary classification. As this decision was in favor of the Federal immunity in the suit, the decision of the State court construing the Constitution of the United States under the then jurisdiction of the Supreme Court, was final.

The same provision of the California Constitution had been held by the Supreme Court of that State to be valid and not violative of the Fourteenth Amendment.[2] Thus, by the decisions of the State courts construing the Federal Constitution, the same system of taxation was held valid in one State and invalid in another.

Under a recent Act of Congress[3] the Judicial code was amended so that the Supreme Court can now require, by *certiorari* or otherwise," any such case to be certified to the Supreme Court for final determination, although the decision of the State court may have been in favor of the right or immunity claimed

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[1] Russell v. Croy, 164 Mo. 68.

[2] Railroad Co. v. Board of Equalization, 60 Cal. 35.

[3] The Act of December 23, 1914, amending the Judicial Code, Sec. 237, is as follows:

"It shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court, although the decision in such case may have been in favor of the validity of the treaty, or statute, or authority exercised under the United States, or may have been against the validity of the State's statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States."

The American Bar Association, at its meeting of 1911, recommended the amendment of R. S., U. S. 709, so that the final judgment of the State court, when a Federal claim was involved, could be reviewed on writ of error where the claim was affirmed, as well as where it was denied.

by the Federal Constitution and laws. As it is for the Supreme Court to determine when such jurisdiction shall be exercised, the State courts will continue as in the past to render judgment in such cases, which will be final if *certiorari* is not granted.

§ 337. **Substance and Not Form Regarded in Alleged Violations of Fourteenth Amendment.**—In determining whether the Fourteenth Amendment has been disregarded by any of the agencies of the State, substance and not form merely will be considered. It was said in a condemnation case[1] that the mere fact of notice and opportunity for hearing does not necessarily decide the question as to whether there was due process of law. "A State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. The judicial authorities may keep within the letter of the statute, prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment." The State cannot make anything due process of law which by its own legislation it chooses to declare such. There must be "due process" in substance as well as in form.

On the other hand, the court has uniformly insisted that there must be a substantial failure to afford due process of law or the equal protection of the laws, before it will interfere especially with the *taxing* system established by the State. Essentials and non-essentials are carefully distinguished.[2] Courts are always reluctant to interfere with the taxing system established by legislative authority, and it has been repeatedly held that this applies with especial force to the Federal Supreme Court in its jurisdiction under this amendment. It must clearly appear that what the State is attempting to do violates the constitutional rights of the property owners.[3]

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[1] Chicago, Burlington & Q. R. R. Co. v. Chicago, 166 U. S. 226, 235, 41 L. Ed. 979 (1887), affirming 149 Ill. 457.

[2] Castillo v. McConnico, 168 U. S. 674, 42 L. Ed. 622 (1898), dismissing writ of error to 47 La. Ann. 1473. See *infra*, Sec. 338.

[3] King v. Mullins, 171 U. S. 404, 43 L. Ed. 214 (1899).

§ 338. **Fourteenth Amendment in Condemnation for Public Purposes.**—The power to condemn private property for public uses is closely analogous to the power of taxation, and the broadened construction of the Fourteenth Amendment is illustrated in the decisions of the Supreme Court relative to its application to the exercise by the States of the former power. The Fifth Amendment to the Constitution, which, as above stated, applies only to the Federal government, provides not only that no person shall be deprived of life, liberty or property without due process of law, but also that private property shall not be taken for public use without just compensation. In Davidson v. New Orleans, *supra*, Sec. 306, decided in 1877, Justice Miller, in delivering the opinion of the court, commented upon the fact that these words relating to the taking of private property for public uses, which are in immediate juxtaposition in the Fifth Amendment, are left out of the Fourteenth.[1]

In the California irrigation case in 1896,[2] the court again referred to this omission, saying that the States are not specifically prohibited by the Federal Constitution from taking private property for any but a public use. But it is claimed, said the court, that the citizen is deprived of his property without due process of law, if it be taken by or under State authority for any other than a public use either under the power of taxation or the right of eminent domain.

But later at the same term, in a condemnation case,[3] the court held unanimously that due process of law under the Fourteenth Amendment does protect the citizen in proceedings for condemnation, and requires not only that the use should be public, but that just compensation should be paid. It said, l. c., 241, that a judgment of the State court, even if it be authorized by statute, whereby private property is taken by the State, or

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[1] But see remarks of Justice Bradley in this case.

[2] Fallbrook Irrigation District v. Bradley, 164 U. S. 112, l. c. 158, 41 L. Ed. 369 (1897), reversing 68 Fed. 948.

[3] Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, *supra*.

under its direction, for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the Fourteenth Amendment to the Constitution, and the affirmance of such judgment by the highest court of the State is a denial by that State of the right secured to the owner by that instrument.

CHAPTER XI.

DUE PROCESS OF LAW IN TAXATION PROCEDURE.

§ 339. Due process of law is "the law of the land."
340. Due process of law in taxation does not require judicial hearing.
341. Notice and hearing not required in cases of licenses, etc.
342. Hearing not required where valuation is fixed by taxpayer.
343. Where amount of tax is dependent on valuation, hearing is required.
344. Notice and hearing in inheritance taxes.
345. Actual notice and hearing held sufficient in absence of statute.
346. Rehearing or appeal to courts not required in valuation.
347. Ruling of State court that hearing is required is conclusive.
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349. Provision for notice may be implied.
350. Distinction between assessments for general and special taxation.
351. Notice by publication.
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353. Collection of taxes through summary proceedings.
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355. Legislative discretion in imposing penalties on delinquents.
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357. The equalization of assessments.
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364. Forfeiture of lands for taxes.
365. Rights of adverse claimants in Kentucky tax forfeitures.
366. New remedies for collection of taxes may be adopted.
367. Effect of statutory conclusiveness of tax deeds.
368. Essentials only considered in reference to due process of law.
369. Limitation and curative statutes.
370. Jurisdiction of United States Courts in enforcing collection of State taxes.

371. No want of due process of law when tax sale is subject to right of redemption.
372. Due process in assessment of trustees.
373. Discretionary and mandatory statutory requirements distinguished.
374. Enforcement of tax lien by plenary civil action.
375. Due process in Michigan railroad taxation.

§ 339. **Due Process of Law is "The Law of the Land."**—"The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law," said Justice Miller,[1] in a notable opinion, "is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment in 1866."

Due process of law in the Fourteenth Amendment means, as the same words in the Fifth Amendment were held to mean, "by the law of the land." The latter phrase in Magna Charta was said by Coke[2] to mean the "due course and process of the law."

The law of the land or due process of law usually implies and includes a regular course of judicial procedure, summons, hearing and judgment. In the famous words of Mr. Webster:[3]

"By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."

The definition of Justice Story[4] is more applicable to the "due process of law" in tax procedure:

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[1] Davidson v. New Orleans, 96 U. S., l. c. 101, *supra*.

[2] 2 Inst. 45, 50.

[3] From the argument in Dartmouth College Case, 4 Wheat. 518, 581, *supra*.

[4] Story on Constitution, 5th Ed., Sec. 1945.

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights, as those maxims prescribe for the class of cases to which the one being dealt with belongs."

§ 340. **Due Process of Law in Taxation Does Not Require Judicial Hearing.**—Due process of law in taxation is that which is due and appropriate in that class of cases, that which in the experience of our race in the enjoyment of self-government has been found due and appropriate.

Thus it has been uniformly held by the Federal and State courts, for substantially the same provision is in all the State constitutions, that due process of law in taxation does not require regular, nor indeed any, *judicial* procedure. This has been the ruling both before and since the adoption of the Fourteenth Amendment. Governments must have their revenues without delay at the times appointed, and obviously the collection cannot be postponed to wait the determination of a common law trial. They must from necessity proceed in a summary way.[1]

The leading and very illustrative case on this subject in the Supreme Court is Murray v. Hoboken Land Co.,[2] decided in 1856, holding that summary process by way of distress warrant from the United States Treasury against a defaulting collector, constituting a lien upon his real estate, was "due process of law" under the Fifth Amendment of the United States Constitution. The court, in an exhaustive opinion by Justice Curtis, holds that the term and its legal equivalent, "the law of the land," must be construed in the light of the common law, and the summary remedies authorized thereby in claims against public defaulters and in the collection of taxes. It said:

"It may be added, that probably there are few governments that do or can permit their claims for public taxes, either on the citizen or on the officer employed for their collection or disbursement, to become subjects of judicial controversy ac-

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1 Bartlett v. Wilson, 59 Vt. 23.

2 18 Howard 272, 15 L. Ed. 372.

cording to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to."

The principle thus declared has been uniformly applied by the Supreme Court in cases where due process of law in the tax procedure of the States has been in question. In the first taxation case under the Fourteenth Amendment, it was said that due process of law in taxation does not mean by a judicial hearing. The nation from which we inherit the phrase itself has never relied upon the courts of justice in the collection of taxes, though she has passed through a successful resistance to unlawful taxation.[1]

In another taxation case,[2] it was said that taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceeding. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which in regard to that matter is, and always has been, "due process of law."

In another early case under the Fourteenth Amendment, the meaning of "due process of law" was exhaustively discussed, l. c., page 104, in a memorable opinion by Justice Miller.[3] He laid down the proposition:

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judg-

[1] Justice Miller in McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335 (1878).

[2] Justice Miller in Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658 (1881).

[3] Davidson v. New Orleans, *supra.*

ment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.[1]

§ 341. **Notice and Hearing Not Required in Cases of Licenses, Etc.**—Due process of law in taxation is that which is due and appropriate, *i. e.*, suitable to the nature of the case. In what are known as license, privilege or occupation taxes, and those imposed upon specific things, where the amount to be paid is fixed by law, and no valuation is required, hearing would be of no service, and therefore none is required.

Justice Field,[2] in the opinion already referred to, *supra*, Sec. 333, says that the distinction between taxes upon licenses and taxes upon values is plain and everywhere recognized.

The same distinction was later made by the same judge in delivering the opinion of the Supreme Court in the California Drainage District Case,[3] l. c. page 708:

"It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. . . . Of the different kinds of taxes which the State may impose, there is a vast number of which from their nature no notice can be

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[1] Justice Bradley gave an opinion, concurring in the conclusion, but saying that he thought the opinion of the court narrowed the scope of the inquiry as to what is due process of law more than it should do. He thought that the court is entitled, under the Fourteenth Amendment, to see not only that there is some process of law, but due process of law; and in judging what is due process of law, attention must be given to the cause and object of the taking, whether under the taxing power, the power of eminent domain, the power of assessment for local improvement, or none of these. If found to be suitable and admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law. Such an examination may be made, he concluded, without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs and preferences of the people of the particular State may require.

[2] County of Santa Clara v. So. Pac. R. R. Co., 18 Fed. p. 409.

[3] Hagar v. Reclamation District, 111 U. S. 701, 28 L. Ed. 569 (1884).

given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter.

"If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no injury into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law.

"In some States, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it.

In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law."

§ 342. **Hearing Not Required Where Valuation is Fixed by Taxpayer.**—The principle, that due process of law in taxation does not require a hearing, where from the nature of the case it can be of no service, was applied by the United States Circuit Court in Virginia to the case of an assessment of shares in national banks. Under the act the assessment was made upon the market value of the shares as reported to the assessor by the bank, and the act itself fixed the amount of the tax upon this market value, so that the tax bills were self-executing and enforceable by levy. The court said that, as the bank itself fixed the market value and the statute the amount of the tax, the assessor's duty was a mere ministerial one, and therefore the case was within the principle declared by the Supreme Court in Hagar v. Reclamation District, *supra,* Sec. 341.[1]

§ 343. **Where Amount of Tax is Dependent on Valuation, Hearing is Required.**—But the court said in the California Drainage Case that, where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors upon such evidence as they may obtain, a different principle applies, and hearing at some stage is required. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with it altogether. In some tribunal, or before some official authorized to correct errors, the owner must be afforded an opportunity to be heard in respect to the proceedings under which his property is to be taken or burdened, and this must be at some time before the tax or assessment becomes final or effectual, in order to constitute such procedure due process of law.[2]

While the imposition of taxes is in its nature administrative

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[1] People's National Bank v. Marye, 107 Fed. 571, l. c. 580.

[2] A leading case is Stuart v. Palmer, 74 N. Y. 183. See also Jackson, J., in Scott v. Toledo, *supra,* and Field, J., in Santa Clara Co. v. So. Pac. R. R., *supra;* Gatch v. Des Moines, 63 Iowa 718.

and not judicial, assessors exercise *quasi* judicial power in arriving at the value, and opportunity to be heard as to value should be given and is given under all just systems of taxation.[1]

The Supreme Court held that due process was not afforded under the law of Georgia whereunder the valuation of property not returned for taxation by the taxpayer was made by the assessing authorities without notice or opportunity for hearing, and was conclusive upon the taxpayer, unless he could show bad faith, even where he may have failed to return the property upon reasonable grounds and upon the honest belief that it was not taxable.[2] The tax in this case was upon the corporate stock of a railroad of another State held by the Georgia corporation. The court said that this class of property had been regarded as non-taxable in Georgia, but the stock had been held taxable in 195 U. S. 219. The court concluded its opinion:

"Reluctant as we are to interfere with the enforcement of the tax laws of the State, we are constrained to the conclusion that this system does not afford that due process of law, which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impairment by State action."

In several cases the State courts have declared tax procedure void under the Fourteenth Amendment as wanting in this particular. Thus, in Virginia,[3] a city charter providing for an assessment for the city tax distinct from the assessment for the State tax and making no provision for correction or review of the city assessment, and a statute of Maryland,[4] requiring distillers and warehousemen to report spirits on hand, which were then valued by the official, but allowing no hearing or appeal, were both held void under the Fourteenth Amendment as want-

[1] Palmer v. MacMahon, 133 U. S. 660, 669, 33 L. Ed. 772 (1890), affirming 102 N. Y. 176.

[2] Central of Ga. R. Co. v. Wright, 207 U. S. 127, 52 L. Ed. 134 (1907), reversing 125 Ga. 589, 617, and 124 Ga. 596, 630.

[3] Heth v. Radford, 96 Va. 272; Evans v. Fall River Co., 9 So. Dak. 130.

[4] Monticello Distilling Co. v. Baltimore, 90 Md. 417.

ing in due process of law. A statute of Ohio, providing for the summary seizure and killing of unlicensed dogs, was also held void as authorizing the taking of property without due process of law.[1]

§ 344. **Notice and Hearing in Inheritance Taxes.**—It was held in Iowa,[2] that, as realty passing by will or inheritance vests immediately in the heir or devisee on the death of the owner, a law providing that real estate subject to an inheritance tax should be appraised after the appointment of an executor or administrator and the tax calculated on the appraised value, the property to be sold in the event of the tax not being paid by the person entitled to the estate, was unconstitutional as depriving the heir or devisee of property without due process of law, in that it authorized the fixing of the appraisement for taxation without notice or opportunity to be heard.

But the inheritance tax law of New York was held not open to this objection, as it made sufficient provision for notice and hearing in determining the value of the estate.

§ 345. **Actual Notice and Hearing Held Sufficient in Absence of Statute.**—The failure of a Kentucky statute to require notice to be given of a special assessment for back taxes on omitted property, made by the regular assessor under Kentucky statute, Sec. 3179, and the time provided by law for the making of the general assessment, does not deprive the taxpayer of his property without due process of law, where the State court has afforded him full opportunity to be heard on the question of the validity and the amount of the tax and on such hearing has reduced the tax.[3] The court said that the State court had held that the taxpayer was entitled to a hearing and had granted and enforced such right and on the trial had reduced the tax. It did not assume the legislative function of making an assessment, and merely reduced at a full hearing

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[1] Fagin v. Ohio Humane Society, 6 Nisi Prius 357.

[2] Ferry v. Campbell, 110 Iowa 290.

[3] Security Trust Co. v. Lexington, 203 U. S. 323, 51 L. Ed. 204 (1906), affirming 27 Ky. Law 591.

the amount of an assessment made by the assessor under color at least of legislative authority.

Thus where the amount of the tax is fixed by law as for cigarette selling and the tax is made a lien upon the real estate, there being no discretion as to the amount of the tax, sufficient provision for notice and hearing to constitute due process of law was afforded the owner of the real property by permitting him to make application to the Board of Supervisors to remit the tax, and in case of a denial of his petition, to appeal to the District Court for a judicial determination of his liability.[1]

Under the same reasoning where the owner has actual notice of an erroneous or inaccurate description of his property in the assessment he is not deprived of his property without due process of law, where he not only has notice from the record but notice in fact that the property was listed and assessed for taxes. It was therefore adjudged that the foreclosure proceeding was valid and the decision in favor of plaintiff in an action to quiet title was affirmed.[2]

Where a board provided an impossible date for hearing, that is, a date before the act authorizing the Board to value the property of public service corporations went into effect, the assessment was not valid, though there was no final notice when it affirmatively appeared that the company had notice and did appear and was heard.[3]

§ 346. **Rehearing or Appeal to Courts Not Required in Valuation.**—In some States, as in New York, the proceedings of a board of assessors or board of review in the valuation of property may be judicially reviewed by *certiorari* or other form of procedure. The absence of such an opportunity however does not constitute want of due process of law. The taxpayer is deemed to have his day in court in the matter of the valuation of his property, if he is allowed an opportunity for hearing at

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[1] Hodge v. Muscatine County, 195 U. S. 276, 49 L. Ed. 477 (1905), affirming 121 Ia. 482.

[2] Ontario Land Co. v. Yordy, 202 U. S. 152, 53 L. Ed. 449 (1909), affirming 44 Washington 239.

[3] Western Union Teleg. Co. v. Trapp, 186 Fed. 114, C. C. A. 8th Cir.

any stage before the tax becomes final, whether before a *quasi* judicial board, or before any other tribunal provided by the State for the determination of such questions. It is no objection that the procedure is summary.

Neither does due process of law require any rehearing or retrial. The Supreme Court said in the Indiana railroad cases:[1]

"A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential in due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect."

It was contended in this case that the valuation fixed by the board was not announced until shortly before adjournment, and that no notice was given of such valuation in time to take any steps for the correction of errors, but the court said that was immaterial, as one hearing before judgment was all that could be asked.

§ 347. **Ruling of State Court That Hearing Is Required Is Conclusive.**—While a party is entitled to a hearing as of right, that is, it must be given him as a matter of law, and not as a matter of favor, the construction by the State court of the State statute that such hearing is allowed by the statute is conclusive upon the Supreme Court.[2] In this, as in other cases, it is the statute as construed by the State court which must deny due process of law. Even where the statute itself makes no provision for a hearing, and the State courts hold that the taxpayer is entitled to it by virtue of the Constitution construed with the statute, the statute and the Constitution will be construed together, and there will be no denial of due process of law.[3]

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[1] 154 U. S. 426, *supra;* McLeod v. Receveur, 71 Fed. 455.

[2] See Indiana Railroad Cases, *supra.*

[3] Kentucky Railroad Tax Cases, 115 U. S. l. c. 334, 29 L. Ed. 414 (1885).

§ 348. **Personal Notice of Fixed Public Sessions of Revision Boards Not Required.**—The requisite notice need not however be personal. It is sufficient that the board of review or other revising authority holds its sessions at stated times, when parties so desiring can be heard in relation to their assessments. Thus the court said in the Kentucky Railroad Cases,[1] that the meetings of the board of equalization were public and not secret. The time and place of holding them were fixed by law, and therefore there was in law both notice and hearing.

In another case, involving assessments of national bank shareholders, the court said:[2]

"It is true the statute contemplates no personal notice to the shareholders, but that has never been considered an essential to due process in respect to taxation. The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard. The statute, therefore, fixes the time and place, for official proceedings are always, in the absence of express provision to the contrary, to be had at the office of the officer charged with the duties, and a notice to all property holders of the time and place of which the assessment is to be made, is all that due process requires in respect to the matter of notice in tax proceedings."

It was further said that "the law in prescribing the time when such complaints will be heard, gives all the notice required; and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[3]

This principle was applied where the Supreme Court reversed

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[1] Kentucky Railroad Tax Cases, 115 U. S. 321; see also State Railroad Tax Cases, 92 U. S. 575, l. c. 609, 23 L. Ed. 663 (1876).

[2] Merchants' Bank v. Pennsylvania, 167 U. S. 461, *supra;* Palmer v. McMahon, 133 U. S. 660, *supra;* Hagar v. Reclamation District, 111 U. S. 701, *supra;* American Transit Co. v. Thomas (Colo.), 63 Pac. 410; Streight v. Durham, 10 Ok. 361.

[3] *In re* Fuller's Estate, 71 N. Y. Supp. 40; see also Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487.

the Circuit Court of Appeals, Sixth Circuit,[1] and held that notice of the time and the place of the first meeting of the State board for the equalization of assessments of bank shares under the Ohio law was sufficient notice to any banks which might be affected by its action, although such action should be taken at a meeting of the board after it had adjourned without fixing a date for a subsequent meeting. It seems that in this case the bank rested on the evidence it had returned to the Auditor. The board met and adjourned on Sept. 20, without fixing a date of meeting, and at a subsequent called meeting, held on Dec. 4, without notice to the bank, raised the assessment of its shares. The court said:

"The board was a public tribunal, open to be invoked, and charged with duties, and necessarily subject to adjournments. What it had done the bank could easily have ascertained and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of every meeting of the board."

The effect of this ruling is to charge taxpayers with notice, not only of the regular and stated meetings of revising boards, but also of called meetings held at any time before their final adjournment. He must take notice that the board may increase his assessment at any such meeting, and is not bound to give him any notice that it contemplates any such action, that is, such increase does not violate the due process of law guaranteed by the Federal Constitution. As State revising boards usually meet at the State capital, this ruling in practical operation may deprive parties of the opportunity of showing that a proposed increase in assessments is unwarranted, as it seems that such increase may be made at a called meeting, when they have no opportunity of knowing that the meeting is to be held or that any increase in their assessments is contemplated.

This ruling was followed in sustaining the action of the Colo-

[1] Lander v. Mercantile National Bank of Cleveland, 186 U. S. 458, 46 L. Ed. 1247 (1902), reversing Mercantile National Bank v. Hubbard, 45 C. C. A. 66.

rado Tax Commission and the Board of Equalization making a 40% increase in the assessed valuation of all taxable property in the County of Denver, which was held not to be wanting in due process of law, because no opportunity to be heard was given to the individual taxpayers, or to any city or county official, as they were all held to have notice by reason of the fact that the time of meeting of these boards was fixed by law.

This ruling has been enforced also in cases involving the validity of tax deeds.[1]

§ 349. **Provision for Notice May be Implied.**—It is not necessary that a statute or ordinance should make express provision for notice to taxpayers, for what is implied in a statute is as much a part of it as that which is expressed. Accordingly where a statute or an ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held and directs that all persons interested in the matter may be heard before it, it is implied thereby that suitable notice shall be given to the parties interested.[2]

The court, after saying that seemingly the final construction placed by the State Supreme Court was to the effect that the charter required notice, added, l. c. page 38:

"But were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature State, the council is its legislature, and the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional

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[1] Longyear v. Toolan, 209 U. S. 414, 52 L. Ed. 859 (1908), affirming 144 Mich. 55 (1908). See also Jackson Lumber Co. v. McCrimmon, 164 Fed. 759.

[2] Paulsen v. Portland, 149 U. S. 30, 37 L. Ed. 637 (1893).

provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council."

§ 350. **Distinction Between Assessments for General and Special Taxation.**—There is a distinction to be observed between assessments for the regularly recurring general taxation and those specially made for local improvements. The former are reviewed by a board of equalization which sits regularly at stated intervals, and of these sessions the taxpayer is bound to take notice, so that no special notice is required. Special assessments, on the other hand, are not made at regular intervals, but whenever the public necessity or convenience requires. The taxpayer therefore can not be charged with constructive notice of such proceedings, and he must have some specific notice of the proposed charge against his property. This notice need not be personal, but may be sufficiently made by publication.[1]

§ 351. **Notice by Publication.**—In service by publication, which is sufficient in case of special assessments requiring notice in some form, the notice must be sufficiently full and clear to disclose to the taxpayer, supposing him to have ordinary intelligence, in a general way what is proposed. The time and place appointed must be such that with reasonable effort he will be able to attend and present his objections.

Thus,[2] it was held that ten days' notice given by publication for three successive days was sufficient. The court said that perhaps the authority of the legislature to prescribe the length of time of notice is not absolutely beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as being ineffectual on account of the shortness of the time. How many days, it was asked, can the court fix as a minimum? It seems that in this case there had been a prior assessment which had been set aside, and the court

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[1] Lent v. Tillson, 140 U. S. 316, 35 L. Ed. 419 (1891); see *infra*, Ch. XIII, "Assessments for Local Improvements."

[2] Bellingham Bay, Etc., Co. v. New Whatcom, 172 U. S. 314, 43 L. Ed. 460 (1899).

said that, as the facts were known, ten days' time did not seem unreasonably short for presenting objections to a reassessment. Notice had been published in the official paper, which the court said was proper, as the party interested would naturally look there for information.

In Lent v. Tillson, *supra,* the point was made that the notices were not published a sufficient number of days, because on some of the days they appeared in the supplement of some of the newspapers, rather than in the body where reading matter is usually found. But this objection the court said did not deserve serious consideration.

Non-resident owners of land within the levee district created by Arkansas Act of February 15, 1893, were not denied the equal protection of the laws or the privileges and immunities of citizens of the United States because Sec. 11 of that act as amended in 1895, while requiring personal service of summons upon resident owners or occupants at least twenty days before rendering a decree of sale for unpaid levee taxes, provides for constructive service by publication upon non-resident owners of only four weeks.[1]

§ 352. **Due Process Satisfied by Opportunity for Hearing at Any Stage of the Proceeding.**—It is immaterial when in the proceedings, whether by way of reviewing the assessment, or in the collection of the taxes, hearing is allowed, provided it is allowed at some stage. Thus if the tax can only be collected by suit, and any defense can be pleaded as to the illegality or error in the assessment, this will be sufficient. But it will not be sufficient, if the defenses are limited by statute, so that the question of error in the assessment cannot be considered. It was said by the Supreme Court however that as a matter of general jurisprudence, in the absence of any contrary provision

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[1] Ballard v. Hunter, 204 U. S. 241, 51 L. Ed. 461 (1907), affirming 74 Ark. 174.

Leigh v. Green, 193 U. S. 79, 48 L. Ed. 623, affirming 62 Neb. 344, 64 Neb. 533, holding invalid the Nebraska statute providing for service by publication upon unknown owners.

[2] Vanceburg & S. L. Turnpike Co. v. Maysville, 63 S. W. Rep. 749.

in the statute, any defense would be admissible in the suit for collection which would establish the illegality of the assessment.

It would seem however that an assessment that is unequal or excessive might be *erroneous*, when it would not be *illegal*, and that due process of law would require that the taxpayer should have his opportunity for hearing on the question of error in, that is, as to the amount of his assessment.

It was stated in a case from Louisiana that, where the statute gives the person against whom taxes are assessed a right to enjoin their collection and have their validity judicially determined, this is due process of law, although he is required, as are plaintiffs in other injunction cases, to give security in advance. This however was a case of a license tax fixed by law upon the business of a liquor seller, and there seems to have been no occasion for any hearing for valuation.

§ 353. **Collection of Taxes Through Summary Proceedings.** —The collection of taxes belongs to the executive branch of the government, and the summary methods for enforcing such collections sanctioned by long experience constitute due process of law. The reasonable exercise by the legislature of a right of classification, to provide a summary process for the sale of property for delinquent taxes amounting to less than a stated amount does not deprive the taxpayer of due process of law.[3] Distress warrants for the collection of personal property taxes without prior notice or an opportunity to be heard are consistent with due process of law, as they were always known to the common law.[4]

§ 354. **Collection of Taxes Through Distraint and Seizure.** —Distraint and seizure of person for the collection of delinquent taxes are also consistent with due process of law. This was illustrated in a decision sustaining the New York statute,

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[1] Kentucky Railroad Tax Case, *supra*.

[2] McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335 (1876); Oskamp v. Lewis, 103 Fed. 906.

[3] Sawyer v. Dooley, 21 Nev. 390.

[4] Nelson Lumber Co. v. McKinnon, 61 Minn. 219.

according to which the party failing to pay taxes on personalty was subject not only to distraint and sale of his personal property, but also to fine for misconduct. A national bank stockholder was prosecuted and convicted under this law, and ordered to stand committed until he paid the amount of the tax with interest and costs, unless the court should see fit sooner to discharge him. The Supreme Court affirmed the judgment[1] and said, page 669:

"Collection by distress and seizure of person is of very ancient date, Murray's Lessee v. Hoboken Land Co., 18 How. 272; and counsel for defendant in error cites many English statutes, commencing with the twelfth year of Henry VII, c. 13, which in their essential features resemble the New York law upon the subject, one in 6 Henry VIII, c. 26, being strikingly like it. 2 Statutes of the Realm 644; 3 Ib. 156, 230, 516, 812; 4 Ib. 176, 334, 385, 744, 991, 1108, 1247; 5 Ib. 9, 700; 7 Ib. 567. Under the act of 1843 commitment is not resorted to until other means of collection have failed and then only upon a showing of property possessed, not accessible by levy, but enabling the owner to pay if he chooses, this constituting such misconduct as justifies the order. That law had been in existence for more than forty years at the time of this proceeding. We do not regard the collection in this way, founded on necessity and so long recognized in the State of New York as to be justifiably resorted to under the circumstances detailed in the act, and operating alike on all persons and property similarly situated, as within the inhibitions of the Fourteenth Amendment."

§ 355. **Legislative Discretion in Imposing Penalties on Delinquents.**—The infliction of penalties on delinquents is a usual and legitimate mode of compelling the prompt payment of taxes and is consistent with due process of law. The same principle of classification allowed to legislative discretion in the imposition of taxes, see *infra,* Chapter XV, is allowed in the enactment of penalties, and the amount of the penalties is a matter for the legislature to determine. This principle was applied by the Supreme Court[2] in sustaining a statute of Indiana imposing a

[1] Palmer v. McMahon, 133 U. S. 660, *supra,* affirming 102 N. Y. 176.

[2] Western Union Telegraph Co. v. Indiana, 165 U. S. 304, 41 L. Ed. 725 (1897), affirming 44 N. E. Rep. 793. But in United States Trust

penalty of fifty per cent of the amount of taxes unpaid upon telegraph, telephone, express and fast freight associations, while the general law of the State only imposed ten per cent for the first six months of delinquency and an additional six per cent for the second six months. The court said that the legislature might well have concluded that the ordinary remedies for the collection of taxes, distraint and sale, in the case of such companies would be open to the objection of interfering with the exercise of their functions, and this furnished a sufficient ground for the adoption of another mode of enforcing collections. Moreover the company, if it wished to contest the legality of taxes, could have paid them under protest and brought suit to recover back the money so paid.[1]

§ 356. **Plenary Power of State in Assessments and Re-assessments.**—In the assesment of property for taxation, the State may make the ownership subject to taxation relate to any day or days or period of the year which it may think proper, and the selection of a particular day, on which returns are to be made by the taxpayers of their property for the purposes of assessment, does not necessarily preclude the making of assessments as of other periods of the year. This was illustrated in a case from Ohio already cited,[2] where the statute provided for the assessment for taxation of the monthly average amount or value of the property or goods in which taxpayers were dealing. The Supreme Court said:

"Of the right of the State of Ohio to make this provision we have no doubt. We know of no principle which forbids that

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Co. v. New Mexico, 183 U. S. 535, 46 L. Ed. 315 (1902), affirming 62 Pac. Rep. 987, the court refused to enforce a penalty imposed by the laws of the Territory of New Mexico, for the non-payment of taxes levied upon railroad property in a foreclosure proceeding, on the ground that it was inequitable to charge interest or penalty until there was an identification of the property subject to taxation and a determination of the amount due. See also Litchfield v. County of Webster, 101 U. S. 773, 25 L. Ed. 925 (1880), where statutory interest in nature of penalty was denied on equitable grounds.

[1] Justices Harlan and White dissenting.

[2] Shotwell v. Moore, *supra.*

State from taking the whole period of a business year already passed as the best means of ascertaining how much the taxpayer shall be required to pay on property which is admitted to be taxable, and how much he shall deduct for the non-taxable securities of the State and of the United States."

If property real or personal has been omitted from the assessment in any year, or if that actually assessed has been grossly undervalued in the assessment, the State has the right to have it assessed or re-assessed, as the case may be, and such action does not impair the constitutional rights of the property owner.[1]

In another case from Ohio the Supreme Court enforced a statute which empowered county auditors to issue compulsory process to bring before them persons who, they had reason to believe, were making false returns of property for the purposes of taxation, and to examine them under oath, and which authorized them also to extend their inquiries into returns of property for a period of four years next before that in which the inquiry was made.[2] The court said that a taxpayer has no vested right in the fruits of false returns, and that the act simply gave a new remedy to the State for enforcing a right which it already possessed.

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[1] Douglas County v. Commonwealth, 97 Va. 397.

[2] Sturges v. Carter, 114 U. S. 511, 29 L. Ed. 240 (1885). This case was brought up on writ or error to the United States Circuit Court and no Federal question seems to have been raised; but the act was claimed to be in violation of the Ohio constitution which prohibited the passage of retroactive laws. In Co-operative Building & Loan Association v. State, 156 Ind. 463, the Supreme Court of Indiana sustained a statute giving tax officials the right to examine books and papers of taxpayers for the purpose of properly listing and assessing property for taxation, and issued a writ of mandamus against a Building and Loan Association to examine its books for evidence of property omitted from the tax list. The court said that the Fourth Amendment to the Federal Constitution against unreasonable searches and seizures operates upon the national government alone, and that the similar provision in the State statute was not violated, as there was nothing unreasonable in the requirement. "If the omission was accidental, the owner ought not to complain, and if intentional, he ought not to be heard except as to the proof of the supposed discoveries."

Thus a statute of Minnesota was sustained by the Supreme Court[1] which authorized the governor, when it should be made to appear that there had been any gross undervaluation of taxable property by the assessors for any county in the State, to appoint a board to revalue and reassess it. This board should, after examination, prepare a list of all such property for the year or years for which it was undervalued, the amount of the assessment and the actual and true value at which it should have been assessed. The statute further provided for the recovery of the tax upon this new assessment. It was claimed that this law gave the executive the power of setting aside the assessment without notice or opportunity to be heard. But this contention was not well founded, for the governor did not act judicially, but only started the inquiry, and the land-owner was allowed a defense before his land could be sold for taxes, because the tax was collected by suit. The only grounds of defense open to him in the suit were that the special facts authorizing the reassessment for past years did not exist and that the property had been reassessed partially, unfairly or unequally. The court held that this constituted due process of law, saying at page 558:

"If an officer omits to assess property or grossly undervalues it he violates his duty, and the property and its owners escape their just share of the public burdens. In Stanley v. Supervisors of Albany, 121 U. S. 535, 30 L. Ed. 1000 (1887), we held that against an excessive valuation of property its owner had a remedy in equity to prevent the collection of an illegal excess. It would be very strange if the State, against a gross undervaluation of property, could not in the exercise of its sovereignty give itself a remedy for the illegal deficiency."

In another case under the Minnesota statute, it was held[2] to be immaterial that the legislature did not provide at the same time for the assessment of back taxes on personal property.

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[1] Weyerhauser v. Minnesota, 176 U. S. 550, 44 L. Ed. 583 (1900), affirming 72 Minn. 519 and 68 Minn. 353.

[2] Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526. See also State v. Weyerhauser, 68 Minn. 353.

The legislature might well determine, in view of the stationary character of real estate and the probability of change in the title of personal property, that it was impracticable to proceed for back taxes in the case of the latter.

A statute of Indiana for the collection of back taxes on personal property was also sustained by the court.[1] The statute authorized the county auditor, when he had reason to believe that any real or personal property had been omitted from the assessment book, to correct the tax duplicate and add such property thereto. It was made the duty of every administrator or executor to pay the taxes due upon the property of the estate in his hands, and if he neglected to do so, having sufficient money on hand, it then became the duty of the county treasurer to present this matter to the court. An executor, who resided in New Hampshire and was visiting Indianapolis in the settlement of the estate, was served with notice by the auditor of an assessment for back taxes, amounting to over $60,000. The treasurer thereupon filed suit against him. The executor claimed that the statute was in violation of the Fourteenth Amendment, as he was a non-resident, that he was deprived of the property without due process of law, and that the court had no jurisdiction. The Supreme Court of Indiana held that he was an official resident at the time suit was commenced and therefore was within the statute.[2] The Supreme Court said that the method followed by the auditor in assessing the additional taxes was perhaps open to criticism, but that, as it was approved by the State courts, there was no question over which that court had jurisdiction. It is the settled law, the court declared, that, when it is asked to review taxation proceedings of the State courts, it must hold due process of law to have been afforded litigants, if they have had an opportunity to question the validity or amount of the assessment or charge before the amount was determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is rendered. As the executor

[1] Gallup v. Schmidt, 183 U. S. 300, 46 L. Ed. 207 (1902), 40 L. Ed. 247 (1895), affirming 40 Minn. 512.

[2] 154 Ind. 196.

had his day in court in the suit to collect the tax, there had been due process of law.

§ 357. **The Equalization of Assessments.**—In nearly all the States there are so-called boards of equalization, and the term "equalization" as used in Revenue Statutes, has for its general purpose the bringing together and equalizing of the local assessments of different districts so as to prevent inequalities in bearing the common burden. Local boards of equalization perform this duty with reference to the different parts of a county or other local districts; while the State boards perform such duty with reference to all the taxing districts of the State where there is, as in nearly all the States, a State tax upon all the property in the State. The statutes imposing this duty upon the State board under the constitutional requirement of uniformity, require that this equalization shall be accomplished by taking the abstracts or returns of the county and city assessors as the basis, and adding or deducting therefrom enough to secure the equalized valuation of the taxing districts.

In such a case from Missouri it was held that the Board had no discretion to divide the counties into several groups and equalize the different classes of property within such groups; and hence mandamus was maintainable to compel the members of the Board to equalize the assessment throughout the State. The court said that such a proceeding for mandamus was not a suit against the State and did not interfere with the discretion of the Board to compel them to perform their duty under the law. The court excepted the governor, who was an *ex-officio* member of the Board, from the writ, but made it run against the other members of the Board.[1]

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[1] Huidekoper v. Hadley, *et al.* C. C. A. 8th Circuit (1910), 177 Fed. 1, reversing 171 Fed. 118. It was held by the same court in Payne v. Germantown Trust Company, C. C. A. 8th Circuit, 136 Fed. 52 (1905), that the ruling by the Supreme Court of North Dakota that its Board of Equalization was entitled to levy taxes in percentages under the statutes of that State instead of in specific amounts, would be followed in the Federal court with respect to lands located in that State and sold for taxes there assessed.

For cases where mandamus, at the instance of judgment creditors,

Notice of the time and place of the first meeting of the State Board of Equalization of the shares of incorporated banks given by the provision of Ohio R. S. 2808, designating the time and place for such meeting was held sufficient notice to any bank which may be affected by its action, although such action may be taken at a meeting of the board held after it has adjourned without fixing a date for a subsequent meeting,[1] the court saying:

"The board was a public tribunal, open to be invoked and charged with duties and necessarily subject to adjournments. What it has done the bank could have easily ascertained, and as easily what it contemplated doing. An inquiry would have ascertained both. By the exertion of a very trifling trouble the bank would have been informed of any meeting of the board."

§ 358. **Assessment in Its Relation to Tax Titles.**—The word "assessment," as used in taxation, does not mean merely the valuation of the property for taxation, but includes the whole statutory mode of imposing the tax and all the proceedings for raising money for the exercise of the power of taxation, from their inception to their conclusion.[2]

A mere irregularity in an assessment will not authorize a court of equity to enjoin its collection, nor will it impair the tax title thereafter based upon such assessment. An assessment is void where the description is wholly insufficient, as where it contained no range, or government survey, or township number; and such an assessment is insufficient to support a

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was sustained to compel assessment at full value in the place of "equalized" value, see *infra*, Sec. 552.

For illustration of enforcement, through *certiorari*, of valuation of St. Louis bank stocks by State Board, quashing valuation by City Board, in excess of said valuation by State Board, see State *ex rel.* v. Schramm, 269 Mo. 489 (1916).

[1] Lander v. Mercantile National Bank of Cleveland, 186 U. S. 458, 46 L. Ed. 1247, reversing 105 Fed. 809. This case was followed in Idaho Ry. Light & Power Co. v. Monk, 218 Fed. 682 (S. Dist. of Idaho).

As to procedure before Board of Equalization of Utah, see Bassett County Treasurer v. Utah County Copper Co., 219 Fed. 811, C. C. A. 8th Cir. (1914).

[2] Jackson Lumber Co. v. McCrimmon, C. C. (1908), 164 Fed. 759.

sale.[1] So also a joint and unapportioned assessment of taxable and non-taxable property is void *in toto*.

The right to assess includes the right to re-assess or make special provision under legislative authority for the collection of taxes which have been omitted or in arrearages.[2]

A statute of New Jersey, authorizing the legislative body of any city to apply to the Circuit Court for the appointment of commissioners to adjust arrearages of taxes, was held not to deny due process of law.[3]

§ 359. **Assessment by Boards of Railroad Commissioners.**—In some States the Board of State Equalization is vested, not only with the power of equalization, but also with the power to make original assessments of certain classes of properties, such as railroads and other public utilities. In some States these powers of assessment, and sometimes also equalization, are given to Boards of Railroad Commissioners; and the same considerations apply to the assessments or orders of such boards as apply to those of assessors or boards of equalization. Thus, in Arkansas, the Board of Railroad Commissioners is authorized to assess railroad property for taxation, and they shall hold their annual meetings on the first Monday in June of each year; and the governor shall have the right to convene the board in a special session at any time. It was held that the making of such an assessment by such a board, at its regular meeting, did not exhaust its power, but that the board was a continuous body, and that therefore, having made an assessment, it had the power of modifying the same for the purpose of compromising litigation. The property of such an order, in the absence of fraud or other improper conduct, was held conclusive on the courts.[4]

§ 360. **State Boards of Equalization in Taxation Procedure.**—While State boards of equalization have been

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[1] Paine v. Germantown Trust Co., C. C. A. 8th Cir. (1905), 136 Fed. 527.

[2] Western Assurance Co. of Toronto v. Halliday (1903), 127 Fed. 830.

[3] Leary v. Jersey City, C. C. A. 3rd Cir., 208 Fed. 854, affirming 189 Fed. 419.

[4] R. R. Taxes Cases, Circuit Court (1905), 136 Fed. 233.

termed *quasi-judicial* bodies in that their findings partake of the nature of judgments and cannot be collaterally attacked if made within their jurisdiction, it would be inaccurate to say that they are vested with any part of the judicial power of the State. Thus, the State Board of Equalization of Tennessee, the decisions whereof were not reviewable by writ of *certiorari* from the Supreme Court of the State, was to be considered as an administrative body rather than a part of the judicial system of the State. The court said that the findings of such a board might be for any purpose and to a large extent conclusive, and yet be very far from constituting a judicial decision upon which alone the claim of *res judicata* could be based.[1]

The court therefore held that the finding of this State Board could be attacked by suit in equity on the ground that the board acted without jurisdiction, where the question of its power to tax property permanently located outside of the State was involved.[2]

§ 361. **Estoppel of Taxpayer by His Return for Assessment.**—The ordinary tax procedure begins with the return made by the taxpayer, whether individual or corporate, in the form furnished by the assessor, setting forth the nature, title, and value of his property. The rule is well established that the taxpayer is bound and estopped by his own statement as to the nature, title, and value of his property made in the list which he returns for taxation, although, of course, the public is not bound, and no one else could be prejudiced by the listing of property which he does not own; nor does the taxpayer make such list a covenant for a title.[3]

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[1] Tamble v. Pullman County, C. C. A. 6th Cir. (1913), 207 Fed. 30.

[2] As to jurisdiction of equity over such Boards in enforcing equality of valuation of interstate railroads, see *infra*, Secs. 546, 547.

[3] R. R. Tax Cases, Circuit Court (1905), 136 Fed. 233. See Udell v. Le Fevre, E. D. Wash., N. D., 222 Fed. 471. In this case this rule was applied for the improvements made upon the smelting site on an Indian reservation.

§ 362. **A Joint and Unapportioned Assessment of Taxable and Non-taxable Property Void in Toto.**—This general principle applies to any assessment by public authority, whether local or State. It was said by the Supreme Court[1] with reference to the assessment by the State Board in California, that if the State Board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be *pro tanto* illegal and void. If the unlawful part can be separated from that which is lawful, the former may be declared void and the latter may stand; but if the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal. This case was decided with reference to the Constitution of California, the court saying that it was unnecessary to express any opinion on the application of the Fourteenth Amendment.[2]

§ 363. **Legislative Legalization of Defective Assessment Held Void.**—While the State may re-assess property which has been defectively assessed, it can only do so through valuation, subject to the right of the taxpayer to a hearing, where hearing is required. A re-assessment cannot be made directly by legislative enactment. Thus in the State of New York, where the statute for the taxation of national bank shares had been declared illegal, the legislature passed an act attempting to validate the illegal assessments. It was held by the United States Circuit Court that the act was void.[3] The court said that the legislature could not "sanction retroactively such proceedings in the assessment of a tax as it could not have sanctioned in advance." The act permitted a review by *certiorari* upon the single ground that the assessment was at a higher proportionate value than other property on the same assessment roll assessed

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[1] California v. Central Pac. Co., 127 U. S. 1, 32 L. Ed. 265 (1888).

[2] The same rule was applied in Clearwater Timber Co. v. Shoshone County, Idaho, Dist. Ct. of Idaho, 155 Fed. 612 (1907), where the assessment included unsurveyed public lands of the United States which were not taxable, and decree was granted to vacate and annul the same and the tax sales of real estate.

[3] Albany City National Bank v. Maher, 9 Fed. 884.

by the same officers. But the court said that the act was defective because it did not allow hearing upon the other grounds which are open to taxpayers generally, and that it was, in effect, a legislative assessment of a tax upon a body of individuals selected out of a general class, without apportionment or equality between them and the general class, or between themselves, and without giving them any opportunity to be heard.

A subsequent curative act however was held valid, as it was made subject to the right of the parties interested to a hearing. It was held to be competent for the legislature to validate retroactively any tax proceedings which it could have authorized in advance. It is not necessary in such case that the hearing be secured before the assessment or collection of the tax. It is sufficient if reasonable provision is made for a hearing afterwards, so that there may be a correction of errors or a restitution of the taxes or the part of the tax unjustly imposed.[1]

An act of South Dakota, purporting to legalize retroactively an assessment in the taxation of all property within a certain county during certain years, was held unconstitutional, in so far as the legislature attempted to dispense with statutory notice to the taxpayer by a meeting of the board of equalization at the designated time and place and in the manner required by statute, since an opportunity to be heard at some stage of the proceedings is a condition precedent to the authorized seizure and sale of property for delinquent taxes.[2]

§ 364. **Forfeiture of Lands for Taxes.**—The forfeiture to the State and subsequent sale of lands for non-payment of taxes, with liberty to the owner upon due notice of the proceeding to intervene by petition and secure a redemption of his lands from the forfeiture by paying the taxes and charges, is not inconsistent with due process of law. The system established by West Virginia, which had been in force for many years before the organization of that State in Virginia, provided that lands liable to taxation should be forfeited to the State, if the owner should

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1 Exchange Bank Tax Cases, 21 Fed. 99.

2 Evans v. Fall River County, 9 S. Dak. 130.

not have them placed in the proper land books for taxation and have himself charged with the taxes thereon for five consecutive years. The land, on petition filed by the representative of the State with the Circuit Court, was to be sold for the benefit of the school fund. This was adjudged to be due process of law.[1] It was urged that the landowner would be without remedy if the State should fail to institute proceedings for sale. But the court said that it could not be presumed that the commissioner would neglect to discharge a duty expressly imposed upon him, or that the courts were powerless to compel him to act when his action was necessary for the protection of the rights of the landowner. The argument of the plaintiff, the court said, proceeded upon the erroneous theory that all the principles involved in due process of law, as applied to proceedings strictly judicial in their nature, apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character. The judiciary should be very reluctant to interfere with the taxing system of a State, and should never do so unless that which the State attempts is a palpable violation of the constitutional rights of the property owners.

But a statute of Maine, requiring owners of lands sold for the non-payment of taxes to deposit with the clerk of the court the amount of all the taxes, interest and costs accrued up to that time, before they could be admitted to contest the validity of the tax or sale, was held void by the Supreme Court of Maine, as depriving them of their property without due process of law.[2] It was held in New York that where the defect in the original imposition of the tax is of so jurisdictional a character as to be

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[1] King v. Mullins, 171 U. S. 404, 43 L. Ed. 214 (1898); see also State v. Sponaugle, 45 W. Va. 415, and 43 L. R. A. 727; State v. Cheney, 45 W. Va. 478.

This ruling was followed in Fay v. Crosier, 217 U. S. 455, 54 L. Ed. 837 (1910), dismissing writ of error from 156 Fed. 496, and in King v. W. Va., 216 U. S. 92, 54 L. Ed. 396 (1910), where writ of error was also dismissed from 64 W. Va. 545, 546 and 610.

[2] Bennett v. Davis, 90 Me. 102.

beyond the reach of a curative legislative act, as where a tax levy was void because the sum was assessed in the name of one who was not the owner or occupant of the land, the original owner is not precluded from asserting his title by a statute making the deeds of a comptroller upon the tax sale, after the lapse of a certain time, conclusive evidence of the sales, and all proceedings prior thereto valid.[1]

§ 365. **Rights of Adverse Claimants in Kentucky Tax Forfeitures.**—There was no denial of due process of law in the provisions of the Kentucky statute under which the forfeiture of land titles to the State as the result of proper proceedings, and after due notice to the owner of the title, who was in default for payment of taxes, inured to the benefit of adverse claimants occupying and paying taxes upon the land and not in default.[2] The court in this case sustained the statute of Kentucky forfeiting certain land titles to the State for failure to list and pay taxes thereon for certain specified years. The tracts in question were formerly a part of the State of Virginia; and prior to 1794, when Kentucky was admitted to the Union, the State of Virginia had granted large tracts of land in that part of the territory, which was now eastern Kentucky. The old grants were outstanding and afforded no revenue to the State of Kentucky; and it was sought by this act to subject the land to taxation and to forfeit these old titles which had not been effectually subjected to the taxing laws of the State, and to make the forfeited titles inure to the occupying claimants, who had paid the taxes thereon in the manner provided by the law. The Court of Appeals of Kentucky had construed the act by stripping it of the requirement to pay interest and penalties as a condition of saving the lands from forfeiture. The court said the act was not *ex post facto*, because the claimant was given time to pay his back taxes; and the retroactive features did not impair any vested rights, and were not forbidden by the Constitution.

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[1] Hagner v. Hall, 10 App. Div. N. Y. 581.

[2] Kentucky Union Co. v. Kentucky, 219 U. S., p. 140, 53 L. Ed. 137, affirming 128 Ky. 610, 127 Ky. 667.

It was also held that there was no violation of the Virginia compact of 1789, which the court had held to be a binding contract between the States. When the lands passed under the dominion of a new State which would require revenues for its support, it was not intended that such land should be immune from constitutional laws, having the effect to subject such lands to the taxing power of the new sovereignty.

§ 366. **New Remedies for Collection of Taxes May be Adopted.**—The State may adopt new remedies for the collection of taxes and apply them to taxes already overdue without a violation of the Federal Constitution. The delinquent taxpayer has no vested right in any existing mode of collecting taxes, and there is no contract between him and the State that the latter will not vary the mode of collection. This principle was applied by the Supreme Court, to the Texas act of 1897 for the collection, by judicial proceedings, of taxes on real estate.[1] The lands in this case had been purchased by the State under the laws then in force. Whether the title acquired by the sale was conditional or absolute, the State could waive the rights conveyed by such sale and prescribe terms upon which it would waive them, and the taxpayer could not complain because he was charged with the ordinary fees and expenses of the lawsuit. The State could moreover provide that taxes, which had already become delinquent, should bear interest from the time that the delinquency commenced. Such a provision did not come in conflict with the Federal Constitution merely because it was retroactive, for the State can enact retroactive laws, provided they are not *ex post facto* in a technical sense and do not impair the obligation of a contract. The Fourteenth Amendment has not changed the rule in that respect. As the State can in the first instance enact that taxes shall bear interest from the time they become due, so, without conflicting with any provision of the Federal Constitution, it may in like manner provide that the taxes which have already become due shall bear

[1] League v. Texas, 184 U. S. 156, 46 L. Ed. 478 (1902), affirming 93 Texas 553.

interest from the time the delinquency commenced. This is adding no extraordinary penalty, for interest is the ordinary penalty for non-payment of obligations.

§ 367. **Effect of Statutory Conclusiveness of Tax Deeds.**— The very strong disposition of the Supreme Court to sustain the tax procedure of the States is evidenced by its rulings in cases where title has been claimed under tax deeds, when it has followed the decisions of the State courts as to the construction of the State statutes. Thus, in affirming a judgment of the United States Circuit Court of Oregon in an ejectment suit,[1] it held that a State legislature might competently declare that a tax deed should be *prima facie* evidence both of the regularity of the sale, and also of all prior proceedings and of title in the purchaser, but that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that may be, conclusive of its own validity, and cannot therefore make the tax deed conclusive evidence of the holder's title to the land.[2]

In a later case involving a tax title in Louisiana, where the act made the tax deed conclusive of the sufficiency of the assessment, it was claimed that, under the decision in Marx v. Hanthorn, this was a want of due process of law. But the court declared[3] that Marx v. Hanthorn came up from the Circuit Court of the United States, which followed the construction given to the tax laws of the State from which the case came by the Supreme Court thereof; and that it was not enough to make a Federal question in a case brought up from the State Supreme Court to show that that court proceeded on a statutory conclusive presumption. The party must go farther, and show that he was actually deprived of his property by means of that presump-

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[1] Marx v. Hanthorn, 148 U. S. 172, 37 L. Ed. 410 (1893), affirming 30 Fed. 579.

[2] Citing Cooley on Taxation, 521, 2nd Ed. 1886. See also Bannon v. Burnes, 39 Fed. 892 and Ball v. Ridge Copper Co., 118 Mich. 7. As to the conclusiveness of recitals in bonds issued for public improvements, see Ramish v. Hartwell, 126 Cal. 443.

[3] Castillo v. McConnico, 168 U. S. 674, *supra.*

tion, that is, the party complaining of it must show that if the presumption had not been entertained the assessment would have been shown to be invalid; for complainant's right was limited to the single inquiry whether in the case which he presented the effect of applying the statute was to deprive him of his property without due process of law. The court therefore looked into the alleged defects, disregarding the statutory presumption, and held that without it the defects were insufficient to sustain the claim of want of due process.

A statute making a tax deed *prima facie* evidence of certain matters therein specified and providing that a judgment for a tax deed should be conclusive evidence of its regularity and validity in collateral proceedings, excepting in cases where the taxes had been paid or the real estate was not liable, was held valid by the Supreme Court of Washington as a proper exercise of legislative power and not amounting to a taking of property without due process of law. The court decided also that when a property owner has notice and an opportunity to defend before his title is actually divested by the delivery of a tax deed, the issuance without notice to him of a tax certificate, which the statute declares shall have the same force and effect as a judgment, execution and sale, will not constitute the taking of property without due process of law.[1]

§ 368. **Essentials Only Considered in Reference to Due Process of Law.**—It has been uniformly declared by the Supreme Court that substance, and not form, essentials, and not non-essentials are to be considered in determining whether there is due process of law in tax procedure. This applies when such procedure has resulted in tax sales and in the adjudication upon tax titles. It applies as well to special taxes and to the validity of titles based upon tax sales thereon as in other cases.[2]

The court said in the case cited that the laws of the State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights, and that an erroneous judg-

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1 State v. Whittlesey, 17 Wash. 447.

2 *Supra*, p. —.

ment as to cost, or a mistake in ascribing the ownership of the land, which did not increase the taxation or which cast that which should have been paid by one tract of land upon another tract of land, did not involve any want of due process of law.

The principle was illustrated in Castillo v. McConnico,[1] in a tax sale for general taxes. The court there held that the defects complained of were all non-essential. Adding to the name of the masculine owner in the advertisement the words "or her estate and heirs" did not destroy the efficacy of the advertisement, and the State had the power, without violating the requirement of due process of law, to dispense with the name in the assessment, substituting any such description and method as would have been legally adequate to convey either actual or constructive notice to the owner. It added:

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a State assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the State statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the law-making power of the State, and as it is solely the result of such authority may vary or change as the legislative will of the State sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the State statute, is a State question within the final jurisdiction of courts of last resort of the several States. When, then, a State court decides that a particular formality was or was not essential under the State statute, such decision presents no Federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the State interpretation of its own law is controlling and decisive."[2]

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[1] 168 U. S. 674, 42 L. Ed. 622 (1898).

[2] As to the distinction between essentials and non-essentials, see also Lent v. Tillson, 140 U. S. 333, 334, *supra*.

The judgment of the highest State court, in determining that due process of law is not violated by its tax procedure, is now reviewable by the Supreme Court in the exercise of its discretion, by writs of *certiorari*.[1]

§ 369. **Limitation and Curative Statutes.**—The State has the constitutional power to enact statutes of limitation relating to tax titles as well as an any other matter, provided that, as to existing rights of action, the limitation gives the claimant a reasonable opportunity to enforce his rights by suit.[2]

Thus a statute of New York provided that deeds from the Comptroller of the State for lands in the forest reservation sold for the non-payment of taxes should, after being recorded for two years, in any action brought more than six months after the act took effect, be conclusive evidence that there was no irregularity in the assessment of the taxes. This was a statute of limitations, and did not deprive the former owner of his property without due process of law.[3]

It was held in Virginia that a law enacted to give purchasers confidence in the sufficiency of tax titles and thereby to promote the most efficient means to collect the delinquent taxes, and which gave to the land-owner the absolute right of redemption for two years after his land had been sold for the taxes, could not be said to be in contravention of the Fourteenth Amendment, because it cut off all defenses, except that the taxes were not chargeable or had been paid.

A statute of Iowa, providing that a claimant under a tax deed should be barred if he did not sue for or take possession of the land within five years after the deed was executed and re-recorded, was held valid.[5]

But a limitation statute, providing that no action for recovery

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[1] See *supra*, Sec. 336.

[2] Wheeler v. Jackson, 137 U. S. 245, 257, 34 L. Ed. 659 (1890).

[3] Saranac Land & Timber Co. v. Comptroller of New York, 177 U. S. 318, 44 L. Ed. 786 (1900), affirming 83 Fed. 436. Following Turner v. New York, 168 U. S. 90, 42 L. Ed. 392 (1897), affirming 145 N. Y. 451.

[4] Virginia Coal Co. v. Thomas, 97 Va. 527.

[5] Barrett v. Holmes, 102 U. S. 651, 26 L. Ed. 291 (1881).

of land sold for taxes shall be maintained unless the plaintiff or his predecessor in title was possessed of the lands within two years next preceding the commencement of the action, if construed to bar a suit when the tax sale appears on the face of the proceedings to have been void and made without authority of law, is not consistent with due process of law.[1] This was the ruling of the United States Circuit Court of Appeals, in reference to the statute of Arkansas, which the court construed however as not depriving the owner of his right to recover possession where the tax proceedings were void. The court said (41 C. C. A. l. c. page 233):

"It is undoubtedly competent for the legislative department to enact reasonable statutes of limitation, to provide that the adverse possession of lands for a reasonable time under a tax or judicial sale shall cure the mere irregularities in the proceedings upon which it rests. But a provision that the possession of land for the limited term of two years under a purchase at a tax sale, which clearly appeared upon its face to be void, because the officer who made it had no jurisdiction or authority to effect it, and because it was made for taxes levied in excess of the limit prescribed by the law, is not process of law, but is a mere legislative fiat and in violation of the fundamental principle of our jurisprudence. If this was the purpose and intent of the legislature of Arkansas in the passage of this act of limitation, the law could not be sustained."[2]

§ 370. **Jurisdiction of United States Courts in Enforcing Collection of State Taxes.**—The equitable jurisdiction of a Federal District Court does not extend to the appointment of its own officers to apportion and collect a tax to satisfy its judgment on county bonds issued in aid of railway construction, unless the State has authorized such a proceeding; and this is true, although the remedy at law by mandamus to compel the proper county officials to levy and collect the tax in conformity with

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[1] Alexander v. Gordon, U. S. Cir. Ct. of App., 8th Cir., 101 Fed. 92, and 41 C. C. A. 228.

[2] For opinion of the Supreme Court of Arkansas on the same statute see Woolfork v. Buckner, 60 Ark. 163, 167.

the State law, has proved ineffectual.[1] The court said that the plaintiff, by bringing suit in the United States courts, acquired no greater rights than were given to it by the local statutes; and that the Missouri statute giving authority to the Circuit Court to enforce, by mandamus or otherwise, an order of the County court to have a tax assessed, could be construed, in the absence of a decision of the Missouri Supreme Court to the contrary, as not a power in the Circuit Court to collect a tax, but only allowing a resort to other means besides mandamus to compel the County court so to do.

Mandamus to compel the county authorities through whom taxes are assessed and collected, to levy a tax to pay a judgment on township bonds, is a remedy which cannot be denied on the theory that because the legislature might, under the Constitution of the State (S. C., Art. 9, Sec. 8), have vested in the township authorities the power to assess and collect taxes for corporate purposes, it could not vest such power in county officers. The court said this remedy could not be denied although the corporate existence of the township had been abolished by the State Constitution, and the corporate agents removed.[2]

The levy and collection of taxes by the city of New Orleans to satisfy outstanding indebtedness of the Metropolitan Police Board, contracted on the faith of the exercise of the taxing power for its payment, did not exhaust the city's power in the premises, where the city had applied the taxes to other purposes and had failed to turn them over, upon demand, to the Board or its representative.[3]

§ 371. **No Want of Due Process of Law When Tax Sale Is Subject to Right of Redemption.**—There was no want of due process of law in the proceeding under California Political Code Sec. 3897, by which land was forfeited for non-payment of taxes, where the State, having become vested with the title to land

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[1] Yost v. Dallas County, 236 U. S. 50, 59 L. Ed. 460.

[2] Graham v. Folsom, 200 U. S. 248, 50 L. Ed. 464 (1906), affirming 131 Fed. 496.

[3] Louisiana *ex rel.* Hubert v. New Orleans, 215 U. S. 170, 54 L. Ed. 144 (1909), reversing 119 La. 625.

worth $500 by the lapse of five years with no offer to redeem following a sale to the State for the unpaid tax, sold the land for $166, all of which went to the State to satisfy a tax, which, with penalties and costs, amounting to but $16.19; the owner having been afforded an opportunity to be heard as to the fairness of the original assessment, and given notice of the time and place at which the property would be sold to the State subject to his right to redeem within five years, and having also been given notice of the second sale by mail and publication, his right to redeem continuing up to the time when the State actually entered or sold.[1]

If a tax title is taken subject to redemption, it cannot be said to be divested without due process of law, if redemption was exercised according to law, where the highest State court holds that whatever title the State held, it sold only an interest which was subject to redemption. There was no denial of due process of law.[2]

§ 372. **Due Process in Assessment of Trustees.**—Due process of law is not violated by proceedings taken in conformity with the statute of Massachusetts, providing that personal property held in trust shall be assessed to the trustees which requires the assessors to give public notice to the inhabitants to return a list of their personal estates, and in case of failure to make such return to ascertain as nearly as possible the particulars of the estate, and estimate its just value which shall be conclusive upon the owner, unless he can show a reasonable excuse for omitting to make his return, and which makes provision for an application to the assessors for an abatement of taxes and for an appeal to the County Commissioners in case of a refusal of the assessors to abate the tax.[3] In this case which was an assessment for the ordinary annual tax upon personal property, it was ascertained by the assessors that the defendant was

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[1] Chapman v. Zobelein, 237 U. S. 135, 59 L. Ed. 874, affirming 19 Cal. App. 132.

[2] Rush v. Land & Mining Co., 211 U. S. 25, 53 L. Ed. 312 (1909).

[3] Glidden v. Harrington, 189 U. S. 255, 47 L. Ed. 798 (1903), affirming 179 Mass. 486.

a trustee in a foreign corporation and the ten directors were assessed with the sum of $160,000 each as trustees. The court held that there was no denial of due process of law in making this assessment against him as trustee as he had an opportunity to apply for abatement and he made such application which was denied. It seems that in this case the statute provided that parties should produce a list of their personal estates including the estates held by them in trust. The suit was brought to recover this tax and the court held that due process of law was not denied in the proceeding.

§ 373. **Discretionary and Mandatory Statutory Requirements Distinguished.**—Discretionary and mandatory requirements in State procedure for the assessment of taxes and enforcement of their collection have been carefully distinguished, and the ruling of the State courts as to what are mandatory as a rule is followed in the Federal Courts. Thus a filing of a complaint in a proceeding to foreclose the lien for delinquent taxes before publication of summons was held not jurisdictional, although the statute provided that the publication of summons shall not be had until the filing of the complaint.[1]

Nor was a judgment to foreclose the lien of a county void for failure to file the application for payment until the day of entry.[2]

Nor is due process of law wanting in making sales of land for unpaid taxes, even if it does not require that the observance of all the steps prescribed by statutes should be made matter of record, and much less that it should be made a matter of particular record such as the return of the sheriff of the sale of the lands.[3] In this case the court said that it may well be doubted whether due process of law within the meaning of the Fourteenth Amendment required a punctilious conformity with the statutory procedure preceding and accompanying the sale, and adding:

"Whether all the steps required by law were actually taken in a particular case and whether the failure to take such steps

[1] Ontario Land Co. v. Wilfong, 223 U. S. 543, 56 L. Ed. 544 (1912), affirming 171 Fed. 51.

[2] Ontario Land Co. v. Wilfong, *supra.*

[3] Turpin v. Lemon, 187 U. S. 52, 47 L. Ed. 70 (1902).

would invalidate the sale, would seem to be a matter of the State court rather than this court to decide; and it would appear that the Fourteenth Amendment would be satisfied by showing that the usual course prescribed by the State laws required notice to the taxpayer and was in conformity with natural justice."

The statute in this case provided that the title to the land should be vested in the purchaser, notwithstanding any irregularity unless such irregularity appeared upon the face of the proceedings. Plaintiff offered no evidence of a failure to observe the steps prescribed by the statute, and the court said that his position did not entitle him to any relief.[1]

§ 374. **Enforcement of Tax Lien by Plenary Civil Action.**— The State of Missouri provided for collection of taxes upon real estate by civil actions against the owners of property to the end that a lien be charged upon the land for the taxes which had been delinquent and the lien foreclosed. This is in effect the enforcement of the State's lien by an ordinary civil action, the title of the owner and of all interested in the title being foreclosed by the plenary judicial proceeding in which everyone interested must be duly served by ordinary process if resident or by publication in other cases if non-resident. In Missouri it has been decided that no personal judgments shall be rendered in the proceeding against the owner of the property, or any execution issued except upon the property charged with the tax. The judgment enforces the lien, and is valid only as to those who are parties to the proceeding.[3]

This statute was adopted by the territory of Arizona, and the Supreme Court of that territory held that the construction of the statute by the court of last resort of Missouri was binding upon it.[4] The Supreme Court affirmed the judgment of the Supreme Court of Arizona in refusing to enforce a tax lien upon certain

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[1] National B. & L. Assn. v. Gilman, C. C. 128 Fed. 293 (1904).

[2] See the Author's Taxation in Mo., p. 225.

[3] State *ex rel.* Rosenblatt v. Sargeant, 76 Mo. 557; State *ex rel.* Hayes v. Snyder, 139 Mo. 549.

[4] Arizona *ex rel.* Gaines v. Copper Queen Cons. Min. Co., 13 Ariz. 198.

mining claims, the tax being assessed upon an increased valuation of certain of the claims made by the Board of Supervisors of the county. The Supreme Court said that it would seem to be elementary that such an enforcement of collection by suit must depend upon a valid assessment as the basis.[1]

§ 375. **Due Process in Michigan Railroad Taxation.**—In affirming the judgment of the United States Court sustaining the validity of the system of railroad taxation adopted in Michigan under the constitutional amendment of 1900, the Supreme Court said that the Federal courts were reluctant to adjudge that a State statute was in conflict with the State constitution before that question had been considered by the State tribunals, and this was especially true when the statute was one affecting the revenues of the State and therefore of general public interest. This reluctance, said the court, became more imperative when the statute had been before the highest court of the State and its validity had been assumed, though not directly decided. The court held that there was no violation of due process of law in singling out railroad and other corporate property, and taxing it for State purposes in a manner and at a rate different from that applicable to other property, when the statute named the time and place for the sessions of the assessing board, and gave to any person or company interested the right to be heard, and authorized the board to correct the valuation. Neither was there any violation of due process of law in taxing railroads and certain other corporate property at an average rate of taxation imposed on all other property in the State subject to *ad valorem* taxes, and such average rate was ascertained by the State board of assessors by dividing the total tax levied on such other property by the value of such property, as returned by the local assessors and State board of commissioners.

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[1] Arizona *ex rel.* Gaines v. Copper Queen Cons. Min. Co., 233 U. S. 87, 58 L. Ed. 863 (1914), affirming 13 Ariz. 198.

[2] Michigan Cen. R. Co. v. Powers, 201 U. S. 245, 50 L. Ed. 744, affirming 138 Fed. 223.

CHAPTER XII.

DUE PROCESS OF LAW AND THE PUBLIC PURPOSE OF TAXATION.

§ 376. Public purpose essential in taxation.
377. Loan Association v. Topeka.
378. Municipal bonds held invalid for want of public purpose.
379. Public purpose of taxation under Fourteenth Amendment.
380. Supreme Court on Loan Association v. Topeka.
381. City taxation of annexed farming lands sustained.
382. What is public purpose for taxation?
383. Conflicting judicial opinions as to public purpose necessary for taxation.
384. Erection of public sorghum mills not public purpose.
385. Elimination of grade crossings and a union railway station a lawful public purpose.
386. Inspiration of patriotism lawful public purpose.
387. Taxation for public ownership.
388. Public purpose in eminent domain.
389. Any proceeding dependent upon taxation for private purpose invalid.
390. Railroad aid bonds.
391. Purpose of taxation must not only be public but pertain to district taxed.

§ 376. **Public Purpose Essential in Taxation.**—Due process of law in taxation requires more than customary tax procedure. A tax has been defined as a contribution enforced by the sovereign authority of the State, according to some rule of apportionment, upon persons and property within its jurisdiction, for the support of government or other public needs. Due process of law in State taxation therefore requires that the tax shall be levied for a public purpose and upon persons or property within the jurisdiction of the State. This conception of a tax was not created by the Fourteenth Amendment but inheres in the nature of a tax, as it is understood in the jurisprudence of the political communities which make up our political system. As to the Fourteenth Amendment in relation to these fundamental principles,

the Supreme Court has said[1] that due process of law refers to that law of the land in each State which derives its authority from the inherent and reserve powers of the State, exerted within the limits of those fundamental principles of liberty and justice, which lie at the basis of all our civil and political institutions, and the greatest security for which rests in the right of the people to make their own laws and alter them at pleasure. But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is to be too vague and indefinite to act as a practical restraint. It is not every act legislative in form that is law. Law is something more than mere will exerted as an active power. Arbitrary power enforcing its edicts to the injury of the persons and property of its subjects is not law.

As taxation belongs to the legislative power, the determination of the public purpose for which taxes shall be levied is primarily a matter for the legislature, but this power is not unlimited. The fundamental principle that taxes can be levied only for public purposes had been declared in the State courts long before the adoption of the Fourteenth Amendment and irrespective of any express constitutional declaration. The constitutions of some of the States provide in express terms that taxes shall be levied for a public purpose only, but such declaration is unnecessary, as a public purpose is implied in the conception of a tax.[2]

That a public purpose is inherent in a tax is further illustrated by the fact that the leading case in the Supreme Court, and indeed in our jurisprudence, on the subject of the public purpose essential in taxation, to-wit, that of Loan Association v. Topeka, was not considered or decided with reference to the Fourteenth

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[1] Hurtado v. California, 110 U. S. 516, l. c. p. 535, 28 L. Ed. 232 (1884).

[2] In some early cases this implied limitation upon the power of taxation was based upon the constitutional provision prohibiting the taking of private property for public use without just compensation, see Cheaney v. Hoosier, 9 B. Monroe 330, p. 341, cited and followed in Wells v. Weston, 22 Mo. 384, 389, see *infra*, Sec. 381n; City of Covington v. Southgate, 15 B. Monroe 491.

[3] 20 Wallace 655, 22 L. Ed. 455 (1875).

Amendment, but on principles of general constitutional law. That decision was rendered by the court in the exercise of its appellate jurisdiction over the Circuit Courts, in a suit brought before the Circuit Court for the District of Kansas on bonds issued to an iron works company by the city of Topeka to aid in their establishing bridge shops in that city.

§ 377. **Loan Association v. Topeka.**—The bonds were issued under authority of an act of the legislature, authorizing certain cities "to encourage the establishment of manufacturers and such other enterprises as may tend to develop or improve the city, either by direct appropriation from the general funds, or by the issuance of the bonds of such city." A majority vote at an election was required. It seems that all the steps were taken, including the election, the bonds were issued and the first interest coupon paid. In a suit upon the coupons in the United States Circuit Court of Kansas, the defense demurred on the grounds, first, that the statute violated the constitution of Kansas, and second, that the act authorized the towns to take the property of the citizens under the guise of taxation, in aid of enterprises which were not of a public nature. The Circuit Court sustained the demurrer, and the judgment was affirmed by the Supreme Court, in a notable opinion by Justice Miller.

The court declined to pass upon the first point, as to whether the statute was authorized by the constitution of the State, saying that, as it found ample ground to sustain the demurrer on the second, it preferred to base its decision upon that. As the contract could only be fulfilled by resorting to taxation, its validity necessarily depended on the power to levy the tax. The court referred to the judicial conflict over railroad aid bonds, and said that such bonds had been sustained on the ground that the purpose was in effect a public one. A law authorizing a tax for a purely private purpose is an unauthorized invasion of private rights.

The court said that a government, which did not recognize that certain rights of citizens were beyond the control of the State, was a despotism, and none the less a despotism because it was one exercised by many instead of by one. The theory of our government

was opposed to the deposit of unlimited powers everywhere. The power to tax was the strongest and most prevailing of all the powers of government reaching directly or indirectly to all classes of the people, and said:

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

After conceding that it is not easy to decide in all cases what is a public purpose, and that the courts are justified in interposing only where the case is clear, it was said:

"In deciding whether, in the given case, the object for which the taxes were assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

But it was said that, in the case at bar, no line could be drawn in favor of the manufacturer, which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.[1]

§ 378. **Municipal Bonds Held Invalid for Want of Public Purpose.**—This case was followed in others from the Circuit Courts, none of them however making any reference to the Four-

[1] Justice Clifford dissented on the ground that the courts had no power to declare an act of the State Legislature void if it was not repugnant to the constitution of the State or the Constitution of the United States, and could not declare it void on the vague ground that they thought it opposed to the general spirit supposed to underlie the Constitution.

teenth Amendment. Thus in Cole v. LaGrange,[1] a suit on bonds issued to a manufacturing company in Missouri, the court said that the general grant of legislative power in the constitution of the State did not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property without the owner's consent for any but a public purpose; nor can the legislature authorize municipal corporations to contract, for private objects, debts which must be paid by taxation. These limits of legislative power were too firmly established by judicial decisions to require extended argument and citations.[2]

Bonds however, issued under a statute of Kansas to aid in the subscription to a custom grist mill were held valid,[3] on the ground that a grist mill run by water was a public use, as declared under the laws of Kansas.[4]

But in a later case from Nebraska,[5] the court held that the act of Nebraska did not authorize the issue of bonds for the benefit of a steam grist mill, and the bonds were held void.[6]

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[1] 113 U. S. 1, 28 L. Ed. 896 (1885).

[2] See also Parkersburg v. Brown, 106 U. S. 487, 27 L. Ed. 238 (1883).

[3] Burlington Township v. Beasley, 94 U. S. 310, 24 L. Ed. 161 (1877), Justice Field dissenting.

[4] The court said in this case at p. 313: "A mill run by water is declared to be an internal improvement by the statute we are considering. It would require a great nicety of reasoning to give a definition of the expression 'internal improvement' which would include a grist mill run by water and exclude one operated by steam, or which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be poor consolation to the people of this town to give them the power of going in and out of the town by railroad, while they were refused the means of grinding their wheat;" citing County v. Miller, 7 Kansas 479. See also Blair v. Cuming Co., 111 U. S. 363, 28 L. Ed. 457 (1884).

[5] Osborne v. Adams County, 106 U. S. 181, 27 L. Ed. 129 (1882).

[6] The Supreme Court of Nebraska in Traver v. Merrick County, 14 Neb. 327, held that there was a distinction between aiding in the development of the water power of the State through the assistance of mills run by water power, and aiding the mills propelled by steam which could at any time be moved to another locality. See also Osborne v. Adams County, 109 U. S. 1, 27 L. Ed. 835 (1883), on motion for rehearing.

The above were all suits upon municipal bonds brought in the United States Court, and decided with no reference to the Fourteenth Amendment. In nearly all, the decisions were based upon the rulings of the State courts. Justice Miller in Davidson v. New Orleans, *supra*,[1] speaks of the decision in Loan Association v. Topeka as decided upon "principles of general constitutional law" of which the court could take jurisdiction when sitting in review of a Circuit Court of the United States, but of which it could not take jurisdiction in reviewing upon a writ of error a judgment of a State Supreme Court.

§ 379. **Public Purpose of Taxation Under Fourteenth Amendment.**—Later decisions of the court however have distinctly referred the basis of the decision in Loan Association v. Topeka to the "due process of law" secured by the Fourteenth Amendment, and have questioned the power of the court to invalidate on any other ground a State tax as wanting in a public purpose, when held valid by the State courts.[2]

Thus in Hurtado v. California, where Justice Matthews for the court, in an exhaustive opinion and discussion of the meaning of due process of law and the Fourteenth Amendment, holds that it does not necessarily require an indictment by a grand jury in a State prosecution for murder, that learned Justice cites and quotes from the opinion in Loan Association v. Topeka as illustrative of "the law of the land," which is guaranteed by "due process of law," and which there constituted a protection against arbitrary power.

In Missouri Pacific Railroad Company v. Nebraska, the court, at page 417, cites Loan Association v. Topeka in support of the proposition that "the taking by a State of the private property of one person or corporation without the owner's consent, for the private use of another, is not due process of law, and is a viola-

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[1] 96 U. S. 97, l. c. 105.

[2] Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232 (1884); Maynard v. Hill, 125 U. S. 205, 31 L. Ed. 654 (1888); Fallbrook Irrigation District v. Bradley, 164 U. S. 155, 41 L. Ed. 369 (1896), reversing 68 Fed. 948; Missouri Pacific R. R. Co. v. Nebraska, 164 U. S. 403.

tion of the Fourteenth Article of Amendment of the Constitution of the United States."

§ 380. **Supreme Court on Loan Asociation v. Topeka.—In** the California irrigation case,[1] the Supreme Court of California had adjudged that the purpose of the assessment was public. But it was contended that the United States Supreme Court was not concluded by this and had the power "under general constitutional law" to determine whether the purpose was public or private. The court held however, that it could only review the decision of the State court on this question, to determine whether the assessment was valid under the Fourteenth Amendment, and that it could not overrule the State court on principles of general constitutional law, saying, at page 155:

"We should not be justified in holding the act to be in violation of the State constitution in the face of clear and repeated decisions of the highest court of the State to the contrary, under the pretext that he were deciding principles of general constitutional law. If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it; but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest State court upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law. The contrary has not been held in this court by the case of Loan Association v. Topeka, 20 Wall. 655. In that case a statute of Kansas was held invalid because by its provisions the property of the citizen under the guise of taxation would be taken in aid of a private enterprise, which was a perversion of the power of taxation. The case was brought in the United States Circuit Court for the District of Kansas, and was decided by that court in favor of the city. There had been no decision of the highest State court upon the question whether the act violated the constitution of Kansas, and consequently there was none to be followed by the Federal court upon that question. This court held that a law taxing the citizen for the use of a private enterprise conducted by other citizens was an unauthorized invasion of private rights. Mr. Justice Miller said that there were such rights in every free government which were beyond the con-

[1] Fallbrook Irrigation District v. Bradley, *supra*.

trol of the State. The ground of the decision was as stated, that the act took the property of the citizen for a private purpose, although under the forms of taxation. In thus holding, there was no overruling or refusing to follow the decisions of the highest court of the State respecting the constitution of its own State.

"We are, therefore, practically confined in this case to the inquiry whether the act in question, as it has been construed by the State courts, violates the Federal Constitution."

It was held that the assessment was for a public purpose sufficient to constitute due process of law.

§ 381. City Taxation of Annexed Farming Lands Sustained.—The doctrine of Loan Association v. Topeka was unsuccessfully invoked in the case of Kelly v. Pittsburgh,[1] where the defendant had extended its boundaries under authority of an act of the legislature of Pennsylvania, by the annexation of adjacent territory. There was included a tract used exclusively for farm purposes, and which, on account of its distance from the built-up portion of the city, was not within the reach of the water, fire, police or other departments of the municipal government. The plaintiff complained that the estimate of his land for taxation was greatly in excess of its true value, and that the city tax was almost destructive of his interest in the property. The Supreme Court of Pennsylvania sustained the validity of this tax,[2] and their judgment was affirmed by the Supreme Court of the United States. Justice Miller, delivering the opinion, said that the cases cited from Kentucky and Iowa, where it had been held that farm lands in a city were not subject to ordinary city taxes, were not applicable and afforded no rule for construing the Constitution of the United States. It might be true that the plaintiff did not receive the same amount of benefit from some of these taxes as citizens living in the heart of the city, and probably his tax bore a very unjust relation to the benefits received. The court however, added:

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[1] 104 U. S. 78, 26 L. Ed. 658 (1881).

[2] A strong dissenting opinion was filed in Pennsylvania by Agnew, Ch. J., 85 Pa. 180, 27 American Reports 633.

"But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them?

"We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, or a State, is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of the public schools to supply to the children of his neighbors and associates if he has none himself.

"The officers whose duty it is to punish and prevent crime are paid out of the taxes. Has he no interest in maintaining them, because he lives further from the court house and police station than some others?

"Clearly, however, these are matters of detail within the discretion, and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law."[1]

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[1] See also Taggart v. Claypool, 145 Ind. 596, and 32 L. R. A. 586, following and applying Kelly v. Pittsburgh. The rulings in the State courts upon this difficult question of the power of the State legislatures in the absence of constitutional restriction to annex and subject farming lands to ordinary municipal taxation, are collated by Judge Dillon, 2 Mun. Corp., 4th Ed., Sec. 795. He says: "It must be admitted that in the absence of specific constitutional restrictions the difficulties in the way of pronouncing such legislation unconstitutional or of affording judicial relief in such cases are almost insurmountable." See also cases collected in note to State *ex rel.* Richards v. Cincinnati (Ohio), 27 L. R. A. 737.

The Supreme Court of Missouri held in 1856 that the legislature could not authorize a municipal corporation to tax for its own local purposes lands lying beyond its corporate limits, Wells v. Weston, 22 Mo. 385.

§ 382. **What Is Public Purpose for Taxation?**—While the declaration of the legislature that a tax is laid for a public purpose must necessarily be given great weight, as taxation is essentially a legislative power, such declaration is not conclusive. It is the universal holding however, that courts are justified in interposing only when it clearly appears that the supreme law governing both the legislature and the judiciary would be violated by the enforcement of the legislative purpose. In determining what is a public purpose, as was said in the Topeka case, the courts are governed mainly by the course and usages of the government, the objects for which taxes have been customarily and by long course of legislation levied, and what objects and purposes have been considered necessary for the support and proper use of the government, whether State or municipal. "Whatever lawfully pertains to this, and is sanctioned by time and acquiescence of the people may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."[1]

In the language of the Supreme Court of Michigan,[2] the public purpose of taxation does not relate to the urgency of the public need, or to the extent of the public benefit, but the term is used to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality.

The public purpose which will warrant the exercise of the taxing power is that which is sustained by the prevailing and controlling public opinion of the time; not the public opinion in the popular sense, which is conclusively reflected in the expression of the legislative will, but the trained and thoughtful judicial opinion. The public opinion of one age or generation however, as reflected in judicial opinions concerning the proper scope of governmental activity, or as to what are the public purposes of taxation, is not the public opinion of another age or of another generation. Upon these questions our juristic concep-

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[1] Quoted by the Supreme Court of Missouri in State *ex rel.* v. Switzler, 143 Mo. 317.

[2] People v. Salem, 20 Mich. 452, l. c. p. 485.

tions must tend to harmonize with the well-settled, all-powerful influences of public opinion in a popular sense. In the words of Mr. Lowell, "our written constitutions are an obstacle to the whim, but not to the will of the people."

The development of judicial opinion upon this subject may be illustrated by selections from a few of the more notable opinions of the many that have been announced in the courts.

§ 383. **Conflicting Judicial Opinions as to Public Purpose Necessary for Taxation.**—It was held in 1875, by the Supreme Court of Kansas, opinion by Judge Brewer, now of the United States Supreme Court,[1] that a statute of that State enacted after a crop failure, authorizing the issue of bonds to raise money for the purchase of seed corn to be given to the farmers, was invalid as authorizing taxation for a purpose which was not public. The provision of the State Constitution authorizing appropriations for the support of the poor was held to be limited to giving aid to paupers. The argument that the prevention of pauperism is a public purpose was dangerous and unsound, and the securing of loans to persons temporarily embarrassed is not a public purpose.

But the Supreme Court of North Dakota in 1890 held a similar statute was valid,[2] declining to follow the Kansas case and saying l, c., p. 97:

"In our view it is not certain or even probable, in the light of subsequent experience in the west, that the court of last resort in the State of Kansas would enunciate the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not changed in the interval, it is also true that the development of the western States has been attended with difficulties and adverse conditions which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those States."

After reviewing the legislation of Minnesota on the same subject, the court continued, at page 99:

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1 State v. Osawkee Township, 14 Kansas 418.

2 North Dakota v. Nelson County, 1 N. Dak. 88.

"This review of legislation in aid of destitute farmers will serve to illustrate the well-known fact that legislation under the pressure of public sentiment, born of stern necessity, will adapt itself to new exigencies, even if in doing so a sanction is given to a broader application of elementary principles of government than has before been recognized and applied by the court in adjudicated cases. It is the boast of the common law that it is elastic, and can be adjusted to the development of new social and business conditions. Can a statute enacted for such broadly humane and charitable purposes be annulled by another branch of the government as an abuse of legislative discretion? We think otherwise."

The court lays stress upon the language of the State constitution permitting the legislature to lend aid "for the necessary support of the poor," and upon the fact that this peculiar language was introduced into the constitutions of North and South Dakota, although nothing of the kind appeared in analogous sections of other State constitutions. It found a reason for this in the peculiar and alarming conditions of the people of the Dakota Territory in 1889 when their constitutions were formed. The seed grain statute was therefore declared to be a valid enactment.

A decision by the Supreme Court of Missouri in 1898 enforces the limitation of the power of taxation with reference to the higher education. A tax levied under an act entitled "For the Endowment of the State University," the proceeds whereof were to be applied in defraying the expenses at the University of students without means, who should be awarded scholarships of merit through competitive examinations, was held to be invalid as levying a tax for private persons and not for a public purpose.[1] The constitution of Missouri directs the maintenance of the State University, and it was urged that, as scholarships are a recognized and historic incident of University endowment, this method of maintenance of the University and making it serviceable in the education of the talent of the State is within the discretion of the legislature which cannot be reviewed by the judiciary. There is no difference in principle, it was contended, be-

[1] State *ex rel.* v. Switzler, 143 Mo. 287.

tween building dormitories for students to live in and paying professors to teach them, as is done under existing law, and endowing scholarships so that deserving students without means can have the benefit of the instruction. But the court said that the act "endowed the students, not the University," and was therefore a paternalistic gift of public money to private individuals; and that it could find no warrant for this endowment of scholarships, either in the organic law of the State, or in the character of our government.

On the other hand, it has been held that the maintenance not only of public[1] and high schools,[2] but also of Normal schools,[3] is a public purpose for which the power of taxation may be invoked, but the contrary is true of mere private schools.[4] In the language of Judge Cooley[5] in the Supreme Court of Michigan:

"Necessity alone is not the test by which the limits of the State's authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to continue the existence of organized government, and embrace those which may tend to make that government subserve the general well-being of society and advance the present and prospective happiness and prosperity of the people."

§ 384. **Erection of Public Sorghum Mills Not Public Purpose.**—In a later decision the United States Circuit Court of Appeals of the Eighth Circuit, in an exhaustive opinion by Judge Sanborn,[6] decided that bonds authorized by the legislature of Kansas, upon vote of the electors of the township, issued to pay a subscription to the capital stock of a corporation organized to erect public sorghum mills, were invalid, and that the tax required was not for a public purpose. In this case the act declared that all mills that received the aid were public mills and should manufacture sugar or syrup for customers. The court said that

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1 Commonwealth v. Hartman, 17 Pa. 118.

2 Richards v. Raymond, 92 Ill. 612.

3 Briggs v. Johnson County, 4 Dillon 148.

4 Curtis v. Whipple, 24 Wis. 350.

5 People v. Salem, 20 Mich. 452.

6 Dodge v. Mission Township, 46 C. C. A. 661, 8th Cir., 107 Fed. 827, 54 L. R. A. 242, decided April, 1901.

the limits of the power to tax are by no means the limits of the police power of the State, and added at page 668:

"Many private occupations, as the sale of intoxicants, the driving of carriages for hire and the construction of private buildings along the streets of a city, bear such a relation to the public welfare that they may be regulated under the police power of a State, when there is an entire absence of power in its legislature to tax the property of its citizens to promote or maintain these enterprises."

The court in this case distinguished the decision of the Supreme Court in Burlington Township v. Beasley, *supra*, Sec. 342, which held that the erection of custom grist mills was a public purpose, saying that the bonds in that case did not show on their face for which of the purposes named in the act they were issued. On the question whether a custom grist mill operated by steam is a work of internal improvement, the court declared that on this point the Burlington Township case illustrates, not the general rule, but an exception thereto, and said:

"This decision is the outgrowth of a more primitive state of society when there were no railroads and few good highways, and when custom grist mills in the immediate neighborhoods of productive fields to grind grain for bread for the people and for food for the cattle were a public necessity. In this state of affairs a line of decisions was developed to the effect that aid in the construction and maintenance of custom grist mills driven by water, and the development of the necessary water power to propel them, was a public object, for which taxes might be lawfully levied upon the property of all the citizens. Guernsey v. Burlington Township, 4 Dill. 375, Fed. Cas. No. 5,855; Harding v. Funk, 8 Kan. 315. The Burlington Tp. Case, perhaps, advanced another step, for the decision was that the promotion of a grist mill propelled by steam, as well as one propelled by water, was a public purpose. This proposition, however, together with the entire line of decisions upon which it rests, forms an exception to the general rule upon this subject, is inapplicable to the public needs and purposes of this day, and ought not to be enlarged."[1]

[1] The payment of a sugar bounty for the encouragement of the industry was held void, Michigan Sugar Co. v. Auditor General, 124 Mich. 674.

After citing the later decisions of the Supreme Court noted above, the court said:

"These decisions show the narrow limits and sharp lines which confine this exception to the general rule."

§ 385. **Elimination of Grade Crossings and a Union Railway Station a Lawful Public Purpose.**—The elimination of grade crossings and the construction of a union railway station in the city of Washington, was held a lawful public purpose in the Acts of Congress of February 12, 1901, and February 28, 1903, providing for the payment to the railway companies of a sum of money to be raised by levy on the taxable property in the district in consideration for the removal of railroads from their present locations and the large expenditure of money by the companies and the surrender by them of substantial rights.[2]

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[1] The opinion in this case contains a valuable review of the decisions upon this subject. See Deal v. Mississippi County, 107 Mo. 464, and 14 L. R. A. 622, holding invalid a bounty for planting forest trees. As there was no right in the public to the trees or their use and control, the act was held void.

In Lowell v. Boston, 111 Mass. 454, an issue of bonds for $20,000,000 for the purpose of loaning money to the owners of land burned over in the great fire of 1872 conditioned upon their rebuilding within a year, the loans to be secured by mortgage, was enjoined as not for a public purpose.

Allen v. Jay, 60 Me. 124, held that the loan of credit for removing a steam saw mill, box factory and grist mill to the village was not for a public purpose. No distinction apparently was made between a saw mill and a grist mill, both being industries pursued for private gain and emolument.

In Weismer v. Douglas, 64 N. Y. 91, bonds issued for the purpose of paying a subscription to stock of a lumber factory, which, it was claimed, would increase the value of adjacent property and promote business by cleaning out the channel of the river and constructing piers, were held void. See also Martha v. Ottawa, 114 Ill. 59; Coates v. Campbell, 37 Minn. 498; Geneseo v. Geneseo Company, 55 Kan. 358.

[2] United States v. Gettysburg Electric R. Co., 160 U. S. 668.

Millard v. Roberts, 202 U. S. 429, 50 L. Ed. 1090 (1906), affirming App. D. C. 221.

The court also decided that the bill was not a revenue bill which, under the Constitution, Art. 1, Sec. 7, must originate in the House of Representatives.

The Supreme Court in this case affirmed the Court of Appeals of the District of Columbia, which had approved the dismissal of a bill to enjoin the Treasurer of the United States from devoting public funds to these purposes. The court said that they assumed that the appellant could raise these questions, but that the purposes were obviously of public benefit. They were for the construction of a work of great magnitude, greater, perhaps, than the needs of the district required; but Congress deemed that they were demanded by the interest of the national capitol and the public at large.

§ 386. **Inspiration of Patriotism Lawful Public Purpose.**— Whatever legitimately tends to inspire patriotic sentiments, and to enhance the respect of citizens for the institutions of their country, and incites them to contribute to its defense in time of war, has been held to be a lawful public purpose, such as will justify the exercise either of the power of taxation or of the power of eminent domain.[1] On this ground and for the further reason that the public taste is educated thereby, the expenditure of public moneys for the promotion of State exhibits at World's Fairs has been sustained.[2]

A tax for raising money to pay bounties to soldiers in order to encourage enlistments in time of war is valid, but a tax for the payment of substitutes for individuals to enable them to escape conscription[3] and for the payment of bounties to soldiers after the war, as a testimonial of the public appreciation of their services, were held to be without consideration and void.[4]

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[1] United States v. Gettysburg Electric R. Co., 160 U. S. 668, 40 L. Ed. 576 (1896).

[2] Daggett v. Colgan, 92 Cal. 53, and 14 L. R. A. 475, where the note contains an interesting collation of the State decisions on this subject. Justice Sanborn, in the United States Circuit Court of Appeals, July, 1902, in chambers at St. Paul, denied an injunction against condemnation proceedings for the World's Fair in St. Louis for the celebration of the Louisiana Purchase Centennial in 1904.

[3] Freeland v. Hastings, 10 Allen 570.

[4] See Booth v. Woodbury, 32 Conn. 118; Mead v. Acton, 139 Mass. 341. The conduct of an agricultural exhibition and the payment of premiums therein constitute a lawful purpose for taxation, State *ex rel.* v. Robinson, 35 Neb. 401, and 17 L. R. A. 383.

The public purpose however, to warrant the exercise of the power of taxation must be one which appeals to all the people and is not in any sense partisan. This distinction was forcibly illustrated in a recent Massachusetts case. An act of the legislature authorized the city of Brockton to erect a Memorial Hall to the memory of the soldiers and sailors of the Civil War. This was held to be a valid statute, because the education of the public taste and inspiring sentiments of patriotism in the public mind serve to promote the general welfare.[1] The city council however, under authority of the statute, passed an ordinance appropriating money for a Memorial Hall and Library building to be used in part by a G. A. R. Post. The court held with regard to this appropriation that it was not for a public purpose, and that there is no definition of a public purpose and use which includes the support and maintenance of a Grand Army Post, saying (11 L. R. A. l. c., 125):

"If once the principle is adopted that a city or town may be authorized to raise money by taxation for conferring benefits on individuals merely because in the past they have rendered important and valuable services for the benefit of the general public, occasions will not be wanting which will appeal strongly to the popular sense of gratitude or to the popular emotion and the interests and just rights of minorities will be in danger of being disregarded."

§ 387. **Taxation for Public Ownership.**—The association of the legal view as to what constitutes a public purpose in taxation with the prevailing public opinion as to the scope of governmental activity was forcibly illustrated in 1890 in Massachusetts, in the opinions of the Justices of the Supreme Court rendered to the House of Representatives of the legislature, under provision of the State constitution authorizing the justices to be thus interrogated as to the lawful powers of the legislature. The question was submitted, whether the legislature under the State constitution could authorize cities and towns to manufacture and distribute gas and electricity for use in their public streets and

[1] Kingman v. Brockton, 153 Mass. 255, and 11 L. R. A. 123.

buildings and for sale to the inhabitants. The justices answered:[1]

"If the legislature is of opinion that the common convenience and welfare of the inhabitants will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think the legislature can confer the power."

But subsequently the House of Representatives submitted to the justices the further question whether power could be conferred by the legislature upon cities and towns to buy and sell coal and wood for fuel for their inhabitants. Five of the seven judges concurred in the answer, that such a power could not be lawfully conferred by the legislature, as it was not a public service within the meaning of the rule that taxes can be laid only for public purposes. The opinion quoted the preamble of the State constitution declaring that "the end of the institution, maintenance, and administration of government is to secure the existence of the body politic; to protect it, and furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life." "That all men are born free and equal, and have certain natural, essential, and inalienable rights, among which may be reckoned the rights of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." And the opinion continued (15 L. R. A., p. 810):

"Constitutional questions concerning the power of taxation, necessarily are largely historical questions. The Constitution must be interpreted as any other instrument, with reference to the circumstances under which it was framed and adopted. It is not necessary to show that the men who framed it or adopted it had in mind everything which by construction may be found in it, but some regard must be had to the modes of thought and action on political subjects then prevailing; to the discussions upon the nature of the government to be established; to the meaning of the language used, as then understood; and to the grounds on which the adoption or rejection of the Constitution

[1] Opinion of Justices, 150 Mass. 592, 8 L. R. A. 487.

was advocated before the people. We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established."

The court said that there was nowhere in the Constitution any provision which tended to show that the government was established for the purpose of carrying on the buying and selling of such merchandise, as, at the time when the Constitution was adopted, was usually bought and sold by individuals and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. After reviewing the precedents in the State from colonial times, the opinion concluded:

"If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the 'co-operative plan,' we are of the opinion that the Constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants. We therefore answer the question in the negative."[1]

§ 388. **Public Purpose in Eminent Domain.**—The public purpose necessary in the condemnation of private property is

[1] Opinion of the Justices, 155 Mass. 598, and 15 L. R. A. 809. In this case Judge Holmes, now of the Supreme Court of the United States, dissented, saying: "I am of opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water or gas or electricity or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets. I see no ground for denying the power of the legislature to enact the laws mentioned in the questions proposed. The need of expediency of such legislation is not for us to consider."

Judge Barker answered: "My answer to the question propounded is therefore, 'Yes, if the necessities of society as now organized can be met only by the adoption of such measures,' and 'No, if there is no such necessity, but merely an expediency for the trial of an experiment.'"

analogous to that required in taxation. In both cases the legislative determination will be respected by the court but will not be conclusive. A distinction however, has been made by high authority[1] between the public purpose in condemnation and that in taxation, to the effect that a more liberal construction of public purposes is allowed in the former than in the latter.[2]

This distinction was thus summarized by the Supreme Court of Massachusetts in the opinion of the Justices upon the power of the legislature to manufacture gas and electricity, *supra*, Sec. 387:

"The extent of the right of taxation is not necessarily to be measured by that of the right of eminent domain, but the rights are analogous. Private property can be taken without the consent of the owner only for public uses, and the owner must be paid full compensation therefor; otherwise he would contribute more than his proportionate share toward the public expenses. By taxation the inhabitants are compelled to part with their property, but the taxation must be proportional and reasonable, and for public purposes. Taxes may be imposed upon all the inhabitants of the State for general public purposes, or upon the inhabitants of defined localities for local purposes, and when distinct private benefits are received from public works special assessments may be laid upon individuals."

It was held by the Supreme Court[3] that the United States had authority under the Fifth Amendment to condemn land for the purpose of preserving and suitably marking the battlefield of Gettysburg, and that any act which may indirectly tend to enhance the respect of the local citizens for the institutions of their country and quicken and strengthen their motives to defend them constitutes a legitimate public purpose.

But an act of the State of Nebraska, which, as construed by the Supreme Court of the State, authorized the Board of Transportation to require a railroad company, which had permitted the erection of two elevators by private persons on its right of way at a station, to grant the same privilege upon similar condi-

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[1] People v. Township Board of Salem, 20 Mich. 452.

[2] Cooley on Taxation, p. 76.

[3] United States v. Gettysburg Electric Ry. Co., *supra*, Sec. 386.

tions to other private persons in that neighborhood, authorized a taking of private property for private use in violation of the Fourteenth Amendment.[1]

§ 389. **Any Proceeding Dependent Upon Taxes for Private Purposes Invalid.**—The cases cited in which the Supreme Court passed upon the want of public purpose in taxation were suits upon municipal bonds which were held to involve the exercise of the power of taxation, and because the purpose of the tax was illegal, the bonds dependent thereon were also invalid. This principle has been extended to the case of a contract made by a village with a manufacturing company, whereby the former agreed to pay the latter for the expense of removal to the village, and further agreed that, in consideration of the removal, it would establish and maintain a fire hydrant and furnish water for fire protection. The village paid the cash bonus but failed to maintain the hydrant. The mill was destroyed by fire and suit was brought for its value by the owner against the village, on the ground that the fire could have been extinguished if the hydrant had been maintained. It was held by the United States Circuit Court of Appeals, Sixth Circuit,[2] that if the municipal corporation under the doctrine of Loan Association v. Topeka was without power to issue bonds for other than a strictly public purpose, it was equally without power to accomplish the same result indirectly by the execution of a contract, for the judgment upon this could be rendered against the corporation which could be satisfied only by taxation. The court said:

"The only difference which could be suggested relates merely to form and to the differences between a direct and indirect method of incurring an obligation which does or may require a resort to the power of taxation."

§ 390. **Railroad Aid Bonds.**—It has been uniformly affirmed by the Supreme Court that, in the absence of restrictions

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[1] Missouri Pacific Railway Co. v. Nebraska, 164 U. S. 403, 41 L. Ed. 489 (1896), reversing 29 Neb. 550.

[2] Southerland-Innes Co. v. Village of Evart, 30 C. C. A., 305 (6th Cir.) 86 Fed. 596 (1898).

in the State constitution, subscriptions for aid in the building of railways, canals and bridges constitute a public purpose for which bonds, to be paid by taxation, can be issued. Thus that tribunal said,[1] referring to a railroad:

"Though the corporation was private, its work was public, as much so as if it were to be constructed by the State. Private property can be taken for a public purpose only, and not for private gain or benefit. Upon no other ground than that the purpose is public can the exercise of the power of eminent domain in behalf of such corporations be supported. . . . Unless prohibited from doing so, the municipal corporation has the same power to aid in their construction as to procure water for its water works, coal for its gas works, or gravel for its streets from beyond its territorial limits."[2]

§ 391. **Purpose of Taxation Must Not Only be Public, but Pertain to District Taxed.**—The requirement of a public purpose obviously applies to all forms of taxation, whether levied by the State or any of the subdivisions of the State to which the power of taxation may be delegated, and whether the tax is general in the State or municipality, or special, that is, levied by way of special assessment in limited taxing districts created for public improvements. Whatever the form of the tax, it is inherent in its nature that it must be levied for a public, as distinct from a private, purpose; and it also must be public in the sense that the purpose must pertain to the district taxed, that is, the tax levied

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[1] Township of Pine Grove v. Talcott, 19 Wall. 666, l. c. 676; Sharpless v. Mayor, 21 Pa. St. 147. In Whiting v. Fond-du-lac Railroad, 25 Wis. 167, it was held that a tax for making a donation to a railroad, in which the county did not become a stockholder, was void.

[2] See also Meyer v. Muscatine, 1 Wall. 384, 17 L. Ed. 564 (1864), and see dissenting opinion of Mr. Justice Miller, who consistently denied this doctrine.

Judge Dillon remarks in 1 Dillon on Municipal Corporations, 4th Ed., note, Sec. 509: "If it be allowable to judge of a legal principle by its fruits, the dissenting and minority of judges on this question will find much to confirm the conviction that their views were sound. But it is useless to fight that battle over again; it has been fought and lost. All that is left is the contemplation and contrast of what might have been and what is."

upon the entire State must be for a general public purpose as distinguished from a distinctively local or municipal purpose. On the other hand, a tax cannot, or rather should not, be levied upon a particular district of a State alone for a general public purpose not peculiar to the district taxed.[1] This line of distinction, however, is not sharply defined, but there is obviously a very large field of legislative discretion in determining what are the public purposes which warrant general taxation on the one hand, and on the other, those which justify the legislature in imposing taxation upon the municipal subdivisions of the State. As the Supreme Court has repeatedly declared, this is one of the questions which cannot be adjusted with precise accuracy, and it is primarily addressed to the legislative discretion.

This principle is applicable in the creation of local taxing districts for public improvements, which will be considered in the succeeding chapter.

Questions relating to the public purpose of taxation can seldom be raised in regard to general levies for State purposes, as such taxes are assessed and collected under general laws, wherein the specific objects for which taxes are to be expended are not set forth, as in the case of taxes levied for specific local purposes; and the courts cannot look behind the declared purposes of a general tax to ascertain the intent of the legislature as to the appropriation of the proceeds of the tax.

[1] Sanborn v. Rice Co., 9 Minn. 273.

CHAPTER XIII.

DUE PROCESS OF LAW IN SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS.

392. Special assessments made under taxing power.
393. Peculiar difficulties in special assessments.
394. Fifth and Fourteenth Amendments in relation to special assessments.
395. General power of State in local assessments.
396. Power of State to impose taxation upon municipalities.
397. Limitation of power to recover personal judgment.
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401. Public improvements in municipalities.
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409. Supreme Court on assessments for sewers.
410. Supreme Court on assessments for streets and sidewalks.
411. Improvement ordinance not invalidated by restricting work to resident citizens.
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419. Where court relief denied, some hearing essential.
420. Hearing not essential for party only contingently liable.
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424. Enforcement of special assessments.
425. Conclusiveness of State determination.
426. Supreme Court in Norwood v. Baker.
427. Norwood v. Baker in State courts and U. S. Circuit Courts.
428. Norwood v. Baker limited to its "special facts."
429. Municipal bonds payable from assessments held valid notwithstanding invalidity of assessment.
430. Supreme Court in King v. Portland.
431. Assessment lawfully levied for benefits already accrued.
432. Eminent domain and special assessments.
433. Legislative power and special facts.
434. Accidental or exceptional circumstances.
435. Requirements of "due process of law."
436. Property incapable of benefit, not lawfully assessable.
437. Municipal bonds for local improvements.
438. Jurisdiction of equity.

§ 392. **Special Assessments Made Under Taxing Power.**—Special assessments for local improvements are made under the sovereign power of taxation,[1] yet they are clearly distinguished from regular tax levies made under State authority for general

1 It was contended at one time that such assessments could only be made in the exercise of the right of eminent domain. For an interesting discussion of this point, see People *ex rel.* Griffin v. Brooklyn, 4 N. Y. 419, which is a leading case on the doctrine that such assessments are an exercise of the power of taxation, and which distinguishes the power of taxation from the power of eminent domain. See also Newby v. Platte Co., 25 Mo. l. c. 269. In certain cases such assessments have been sustained as an exercise of the police power of the State, as in the case of drains and sewers, Paulsen v. Portland, 149 U. S. 30, *infra;* Morrison v. Morey, 146 Mo. 543, where the creation of levee districts was sustained on that ground. Special assessments for sidewalks have also been sustained as an exercise of the police power, Palmer v. Way, 6 Colo. 106; State v. Newark, 8 Vroom (N. J.), 415; Washington v. Nashville, 1 Swan (Tenn.) 177. See also McBean v. Chandler, 9 Heisk. 349. A distinction was thus made in some cases between sewers and sidewalks and other improvements. But it was said by Redfield, J., in Allen v. Drew, 44 Vt. 174, that it is not easy to see any distinction between an assessment for the building of a sewer or sidewalk and an aqueduct, and that each in degree is a general benefit to the public and a special benefit to the local property both in the uses and the enhanced value of the property.

public purposes. Taxes proper, or general taxes, it was said by the Supreme Court,[1] proceed upon the theory that the cost of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no special benefit, but only secures to the citizen that general benefit, which results from the protection of his person and property and the promotion of those various schemes which have for their object the welfare of all. On the other hand, special assessments or special taxes are justified by the principle that when a local improvement enhanches the value of neighboring property, that property should pay the expense. Special assessments are made upon the assumption that a portion of the community will be specially and peculiarly benefited by the enhancement of the value of property peculiarly situated as regards the contemplated expenditure of public funds; and, in addition to the general levy, special contributions in consideration of the special benefit are required from the party specially benefited.

It was said in an early case in Missouri:[2]

"These special assessments are found in the English law and have prevailed, it is believed, in most, if not all, of our American States, and their validity, when assessed, as in this instance (for a sewer tax), cannot be questioned under our constitution. Their intrinsic justice strikes every one. If an improvement is to be made the benefit of which is local, it is but just that the property benefited should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the benefit of the few. A single township in a county ought not to bear the whole county expenses, neither ought the whole county be taxed for the benefit of a single township. And the same principle requires that taxation for a local object, beneficial only to a portion of a town or city, should be upon that part only. General taxation for a mere local purpose is unjust. It burdens those who are not benefited and benefits those who are exempt from the burden."

[1] Illinois Central R. R. Co. v. Decatur, 147 U. S. 190, l. c. 197, 37 L. Ed. 132 (1893).

[2] Lockwood v. St. Louis, 24 Mo. 22.

Special assessments are clearly distinguished from general taxes. Thus contracts of exemption from taxation have been held not to exempt the property from assessments for public improvements,[1] and it is a question in the construction of private contracts, like leases, whether the term taxation therein includes special assessments.[2]

§ 393. **Peculiar Difficulties in Special Assessments.**—The exercise of the taxing power of the State to pay the cost of a public improvement by assessment upon the property specially benefited involves peculiar difficulties which do not attend the levy of general taxes. For the latter, there is no need to create a special taxing district and define its boundaries, nor is there any question as to the determination of what property is specially benefited by the expenditure of the taxes when collected. All this is regulated by general law. Neither is there any question, as a rule, as to the notice and opportunity to the taxpayer for hearing in relation to the assessment. Property is assessed for general taxation under general law, and the taxpayer is bound to take notice of the time and place fixed for hearing by the board of review or equalization to which he may appeal for correction of his assessment. Furthermore general taxes are assessed and collected at regularly recurring intervals fixed by law; and the proceeds of general taxes, when collected by the State of political subdivision acting under State authority, for prescribed public purposes, are disposed of by the legislative authority within the limits of its power. Comparatively seldom

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[1] *Supra*, Sec. 96.

[2] It was said by the Supreme Court of Missouri, sustaining a special assessment for the establishment of a public park, Kansas City v. Bacon, 157 Mo. 450, l. c. 463: "There are two kinds of taxation, both emanating from the taxing power of the government, but each resting on a different principle, the one aimed to raise a revenue for general governmental purposes, the other to raise a fund to be devoted to a particular purpose. The one for its justification leaves out of view the question of individual benefit, merging the individual in the community, the other for its justification advances the theory that the individual is benefited by the improvement contemplated, and because of his benefit he must contribute to the cost."

therefore have questions arisen concerning due process of law in relation to general taxation, and these have usually been in relation to special methods of assessment applied to certain classes of property, as in the valuation of railroads or other interstate properties.

But special assessments for local improvements from their very nature involve peculiar and difficult questions, which have occasioned much litigation and much diverse judicial opinion. Thus what are the limits, if any, of the power of the State to determine that any public improvement shall be paid for by local taxation, rather than out of the public revenues, to determine the boundaries of the taxing district whereon the cost of that improvement shall be levied, and to determine the method of apportionment upon the property in the district, whether by ascertainment of values through *quasi* judicial bearing, or by some definite rule, as by area or by frontage? When must notice and opportunity for hearing be afforded to the taxpayer to constitute due process of law?

§ 394. **Fifth and Fourteenth Amendments in Relation to Special Assessments.**—The subject of due process of law in connection with special assessments for local improvements has been considered by the Supreme Court of the United States in numerous cases, in relation to both the Fifth and the Fourteenth Amendments to the Constitution. The provision of the Fifth Amendment that no person shall be deprived of life, liberty, or property without due process of law, as heretofore shown, is only a restraint upon the power of Congress and not upon the power of the States; while the Fourteenth Amendment imposes the same prohibition directly upon the States. In cases from the States, the Supreme Court has considered the question with relation to the Fourteenth Amendment, while in cases from the city of Washington or elsewhere in the District of Columbia where Congress exercises exclusive jurisdiction, both political and municipal, it has applied the Fifth. In a recent case[1] the court said:

[1] French v. Barber Asphalt Paving Co., 181 U. S. 324, l. c. 328, 45 L. Ed. 879 (1901), affirming 158 Mo. 534, 54 L. R. A. 492.

"While the language of those amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper."

The court, however, further stated in this case that it proceeded therein upon the assumption that the legal import of the phrase due process of law is the same in both amendments and added, l. c., page 329:

"Certainly it cannot be supposed that, by the Fourteenth Amendment, it was intended to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government in a similar exercise of power by the Fifth Amendment."

In none of the cases has the Supreme Court made any distinction between the two amendments as to the two requirements of "due process of law" in special assessments.

§ 395. **General Power of State in Local Assessments.**—Although special assessments are usually made for public improvements in municipalities and form one of the most perplexing problems in municipal government, their use is not limited to municipalities. Public improvements, which may be of special benefit to property in a certain locality, may be required in any part of the State, and in the application be thus warranted of the principle on which special assessments rest, that the property benefited by the improvement should pay the cost. The State therefore has the general power not only to determine that public improvements shall be made, whenever it deems them essential to the health and prosperity of the community, but also to determine to what extent the cost of such public improvements shall be paid by the public at large and what part shall be paid by the property specially benefited thereby. It follows that the State has the power, subject to the restraint of its own constitution, to establish local taxing districts in any part of its territory and to impose upon such districts the cost of a public improvement. Upon the same principle it may impose the expense

of a public improvement upon a municipality, which is specially benefited thereby, although benefit from the improvement may also inure to the people of the State at large. Thus it was said by the Supreme Court,[1] in reference to the act of the State of Alabama, which imposed upon the city of Mobile the expense of a harbor improvement in Mobile Bay:

"When any public work is authorized it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation. The judicial power of the Federal government can only be invoked when some right under the Constitution, laws, or treaties of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."[2]

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[1] Mobile v. Kimball, 102 U. S. 691, l. c. 703, 26 L. Ed. 238 (1881).

[2] It was said by the Supreme Court of Missouri in State v. Leffingwell, 54 Mo. 458, l. c. 473, holding void an act making a park district out of part of a city, that nothing is better settled than that special taxation for objects that are general and public is illegal. . . . "The legislature has no power to take the money of one man and transfer it to another, nor can it select a particular township and say that it shall pay all the taxes of the county, nor designate a certain county and declare it shall assume all the burdens of the State." The act was held void on the ground that the property in the district was not any more benefited by the park than the property in the city at large, and

§ 396. **Power of State to Impose Taxation Upon Municipalities.**—The power of the State to create taxing districts is closely allied with its sovereign power over its political subdivisions and municipalities, the limits of which it is obviously very difficult to determine. The question of the State's power over its municipalities was presented in another form to the Supreme Court, in a case involving the validity of a statute annexing to a city what was claimed to be rural territory, and imposing upon the latter's inhabitants arbitrarily the burden of taxation for city purposes, in return for which it was claimed they derived no benefit.[1] The court held that what portion of the State should be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city should be settled is one of the matters within the legislative discretion. Whether territory shall be

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the case was decided irrespective of the provision of the State constitution as to organizing public corporations. In Dyar v. Farmington Village, 70 Me. 515, an act authorizing a town to levy a general tax upon part of the real estate included within its limits was held void, the court saying that one public district could not be created within another nor be allowed to overlap another, so that for the same public purpose or any other public purpose one portion of the real estate is taxed twice while the remainder is taxed only once.

[1] Kelly v. Pittsburgh, 104 U. S. 78, *supra*, Sec. 318. See also Forsythe v. Hammond, 68 Fed. 774. It has been held in Missouri that the legislature cannot constitutionally authorize a municipal corporation to tax for its own purposes lands lying beyond its limits, Wells v. Weston, 22 Mo. 384. It would seem, under the same principle, that the legislature could not impose upon a municipality a tax for purely State purposes having no relation to the municipality. Judge Dillon says in Municipal Corporations, 4th Ed., Sec. 73, as to the distinction between the public and proprietary rights of a municipality, after reviewing the authorities, that there are difficulties attending the usually unlimited power over municipal corporations, and difficulties also in assigning limits to that power. He concludes: "On the whole the question whether a city may be compelled to create a debt or liability against its will must be answered, we think, with reference not only to the constitutional provisions of the State, but to the nature of the purposes for which the debt or liability is to be incurred.

governed for local purposes by a county, a city, or a township organization is one of the most usual and ordinary subjects of State legislation, and the court refused to interfere with the exercise of the legislative discretion on this subject.

This principle of the State's control over its municipalities was reaffirmed by the court in sustaining the legislation of Connecticut, whereby a bridge district was made of five municipalities, upon which was apportioned the cost of the purchase and maintenance of a free bridge in the proportion of benefits received by each, as determined by judicial proceedings.[1] The regulation of municipal corporations is a matter peculiarly within the domain of State control, and a municipal corporation, so far as its purely municipal relations are concerned, is simply an agency of the State for conducting the affairs of the government, and as such subject to the control of the legislature. These are matters of a purely local nature, in respect to which the Federal Constitution does not limit the power of the State. It was also said that the legislature, speaking generally, may create a new taxing district, if the State's constitution does not prevent, and determine what territory shall belong to such district and what property shall be considered as benefited by the proposed improvement.

The power of the State to impose upon municipalities or local taxing districts the cost of public improvements is primarily a legislative power. As this power in the distribution of public burdens is of the very essence of sovereignty, it is very difficult to declare its limitations, and especially is this true when the Federal Supreme Court is called upon to review the judgment of the State courts upon the validity of State legislation. Nevertheless it is clear that the fundamental canons of taxation, that the purpose must be public and that the public purpose must directly appertain to the district taxed, apply to special assess-

[1] Williams v. Eggleston, 170 U. S. 304, 42 L. Ed. 1047 (1898), affirming State v. Williams, 68 Conn. 131. As to the power of the State over municipalities, see also New Orleans v. New Orleans Water Co., 142 U. S. 79, 35 L. Ed. 943 (1891), dismissing writ of error to 42 La. Ann. 910.

ments as fully as to general taxation. The legislative power is not absolute and unlimited in the one case any more than in the other. The legislative discretion, therefore, in apportioning the cost of public improvements, while broad and comprehensive, is not unlimited, but is subject to judicial review and scrutiny in determining whether property charged with such cost is taxed in accord with the fundamental canons of taxation and thus under "due process of law."

The Fourteenth Amendment does not deprive a State of the power to compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of a drain and to make special assessments accordingly, when notice is given and opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.[1]

§ 397. **Limitation of Power to Recover Personal Judgment.**—The State must exercise this power within the limits of its jurisdiction and cannot, therefore, in assessing the cost of a public improvement upon the property in a certain district, authorize the recovery of a personal judgment against a non-resident, without service of process. Thus the statute of Iowa authorized a personal judgment in a suit upon a special tax bill for a local assessment. It was held by the Supreme Court[2] that such a judgment rendered without personal service against a non-resident, so far as the personal liability is concerned, would amount to the taking of property without due process of law; and that such a judgment is good only so far as it affects the property which is taken or brought under the jurisdiction of the court or other tribunal in an ordinary action to enforce the personal liability. No jurisdiction is thereby acquired over the person of a non-resident, further than respects the property so

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[1] Soliah v. Heskin, 222 U. S. 522, 56 L. Ed. 294 (1912), affirming 17 N. D. 393.

[2] Dewey v. Des Moines, 173 U. S. 195, 43 L. Ed. 665 (1899), reversing 101, Iowa 416.

taken, and this is as true of an assessment against a non-resident as of a more formal judgment. In this case the landowner never voluntarily appeared in the litigation.

But it seems that the authorization of a personal judgment on a special assessment, to be recovered upon personal service, is within the power of a State and presents no Federal question.[1] As to this point the court said, l. c., page 106:

"It is urged with force,—and some highly respectable authorities are cited to support the proposition,—that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a Circuit Court of the United States,[2] we might be called upon to decide it; but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase 'due process of law,' and none other is called to our attention in the present case."

§ 398. **Assessments for Drainage.**—The extent of the State's power to create special taxing districts for public improvements is illustrated in the drainage or swamp land cases, wherein the laws of Louisiana, New Jersey and California, provid-

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1 Davidson v. New Orleans, 96 U. S. 97, *supra.*

2 This was a writ of error to the Supreme Court of Louisiana. Though it may be within the power of the State to create and enforce a personal liability in such cases, it is difficult to see how it can be defended. Special assessments rest upon the theory that the property is benefited sufficiently to pay the tax, and it seems inconsistent therewith that there should be any liability beyond the value of the benefited property. See Taylor v. Palmer, 31 Cal. 240, where the decision seems to have turned upon the construction of the State constitution. In Neenan v. Smith, 50 Mo. 525, the court based its decision denying the right to a personal judgment on its construction of the statute, but said that it greatly doubted whether a legislature has the power to authorize a general charge upon the owner of local property that may be assessed for its special benefit, unless the owners of all taxable property within the municipality are equally charged.

ing for the drainage of swamp lands by the levy of local assessments, were all sustained by the Supreme Court.[1]

In the first of these cases it was claimed that the property of the plaintiff was not benefited by the improvement. The court said that this was a matter of detail on which it could not interfere, if it was clearly true; but that it was hard to fix a limit within the two parishes which constituted the taxing district, where the property would not be benefited by the removal of the swamps and marshes situated in those parishes.

In the second case in California, a system was formed for reclaiming swamps and overflowed lands and fitting them for cultivation through reclamation districts, established by the supervisors of a county upon petition of one-half or more of the holders of the lands. Commissioners were appointed to view the land and assess upon each acre to be reclaimed a tax, which should be its proportion of the whole expense. The Supreme Court sustained the judgment of the Circuit Court enforcing the collection of these taxes, saying, page 704:

"It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations, as well as for the opening of streets in cities and of roads in the country.

"It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the State. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. County of Mobile v. Kimball, 102 U. S. 691, 704. The rule of equality and uniformity, prescribed in cases of taxation for State and county purposes, does not require that all

[1] Davidson v. New Orleans, 96 U. S. 97; *supra*, Hagar v. Reclamation District, 111 U. S. 701; Wurts v. Hoagland, 114 U. S. 606, 29 L. Ed. 229 (1885) *supra*.

property, or all persons in a county or district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent. As we said in Louisiana v. Pilsbury, 105 U. S. 278, 295, there would often be manifest injustice in subjecting the whole property of a city, and the same may be said of the whole property of any district, to taxation for an improvement of a local character. The rule, that he who reaps the benefit should bear the burden, must in such cases be applied."

In the third case the New Jersey act provided for a system of drainage of all wet or marshy lands, upon proceedings instituted by at least five owners of separate lots of land in the tract and not objected to by the owners of a greater part thereof. The commissioners appointed by the Supreme Court of the State, after notice and hearing, made an assessment of the cost of the drainage upon all of the owners in the district. The Supreme Court after remarking that such drainage assessment had been sustained by the courts of New Jersey, held that, as the statute was applicable to all lands of the same kind, and no person could be assessed under it for the expense of the drainage without notice and opportunity to be heard, there was no deprivation of property without due process of law.

§ 399. **Assessments for Irrigation.**—A very important extension of this principle was made by the courts in sustaining the Irrigation Acts of California[1] of 1887, and as amended by the act of 1891. This statute provided for the formation of irrigation districts upon the petition of fifty or a majority of the owners of land susceptible of one mode of irrigation from a common source and by the same system of work. On hearing, as to whether petitioners were of this class, whether they had com-

[1] Fallbrook Irrigation District v. Bradley, 164 U. S. 112, *supra*.

In C., B. & Q. R. Co. v. Board of Supervisors, C. C. A., 8th Circuit, 182 Fed. 291, 301, affirming 170 Fed. 665 (1910), it was held that an assessment of benefits made by a drainage board against the property of a railroad company on account of the construction of a public drainage ditch, affirmed by the court, will not be disturbed by an appellate court, except in case of gross error showing prejudice, corruption, or plain mistake.

plied with the statutory requirements and whether their lands would be benefited by the proposed improvements, the board of supervisors might modify the boundaries of the district so as to include other lands susceptible of the same improvement, that is, by irrigation from the same source, and to exclude lands which would not be thus improved. On approval by a two-thirds vote at an election in the district, held under the direction of the Board of Supervisors, the irrigation district should be organized as a public corporation with fixed boundaries and the cost of the irrigation works assessed *ad valorem* upon all lands within the corporate limits. In a suit brought in the United States Circuit Court by an alien property owner in the district, the enforcement of this statute by giving a deed of plaintiff's land sold for the non-payment of the assessment was enjoined on the ground that the statute was void as taking property without due process of law.[1] It was strongly urged on appeal that this act was distinguished from the drainage cases, in that there only the land drained was assessed for the improvement, but that in this case a man's land could be included, even if he did not want the water, did not need it and would not be benefited by it. It was also claimed that it was a delegation of the power of taxation to irresponsible petitioners and to a majority of the electors of the district.[2]

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[1] For opinion in the Circuit Court, see 68 Fed. 948. This act had been sustained by the Supreme Court of California, Modesto Irrigation District v. Tragea, 88 Cal. 334. See also *In re* Madera Irrigation District, 14 L. R. A. 755, 92 Cal. 296. For an opinion of the Sup. Court of Nebraska holding the Irrigation Act of that State valid under State and Federal Constitutions, see Board of Directors v. Collins, 46 Neb. 411.

[2] See argument of Mr. Joseph H. Choate in this case, pp. 131 to 151. He said at page 142: "Patronage, plunder and bonds without limit are the obvious tendency and result, if not the direct object, of the act. Towns and villages, however solidly built, may be included, and practically are included in the districts proposed. . . . We submit, with all confidence, that this novel mode of constituting districts for assessment is an unlawful delegation of legislative power, and is in its very nature one of those exercises of the powers of government, unrestrained by the established principles of private rights and of dis-

The Supreme Court, reversing the Circuit Court, held[1] that the act was valid and enforceable. The irrigation of really arid lands is a public use, and the question whether any particular land will be benefited is one of fact, for the determination of which the act made sufficient provision.

The court said, l. c. 166, that the question to what extent the land required irrigation was primarily legislative, though "subject to the scrutiny and judgment of the courts to the extent that it must appear that the use intended is a public use, as that expression has been defined relatively to this kind of legislation." The act sufficiently limited the land which could be included in a district. It must be susceptible of irrigation from a common source, and by the same system of works, and it must be of such a character that it would be benefited by irrigation by the system to be adopted. This meant that the benefit must be

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tributive justice, which this court has declared to be the thing which constitutes the taking of a man's property without due process of law." In this case, Mr. Maxwell appeared with Mr. Choate, while against them were ex-President Harrison, ex-Judge John F. Dillon, Mr. William B. Guthrie, and Mr. Clarence A. Seward.

[1] Chief Justice Fuller and Justice Field dissented. The magnitude of the interest involved in this litigation may be realized from the following portion of the statement, p. 152:

"What is termed the 'arid' belt is said in the Census Bulletin, No. 23, for the census of 1890, to extend from Colorado to the Pacific Ocean, and to include over 600,000,000 acres of land. Of this enormous total, artificial irrigation has thus far been used only upon about three and a half million acres, of which slightly over a million acres lie in the State of California. It was stated by counsel that something over thirty irrigation districts had been organized in California under the act in question, and that a total bonded indebtedness of more than $16,000,000 had been authorzed by the various districts under the provisions of the act, and that more than $8,000,000 of the bonds had been sold and the money used for the acquisition of property and water rights and for the construction of works necessary for the irrigation of the lands contained in the various districts."

The Act of Congress of June 17, 1902, appropriates the receipts from the sale and disposal of public lands in certain western States and Territories, to be set aside as a "reclamation fund" for the construction of irrigation works to reclaim arid lands, in the area between Kansas, Nebraska and the Dakotas and the Pacific Ocean.

substantial, and the question whether any particular land would be substantially benefited was necessarily one of fact, upon which the court could not review the decision of the State court.

In answer to the claim that apportionment of the expense upon an *ad valorem* basis was wholly arbitrary and without any regard to the actual benefits received, some lands being, without irrigation, wholly arid, and some needing very little irrigation, if any at all, the court said, pp. 176, 177:

"Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the State constitution, yet as the State court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the Federal Constitution is shown in such an assessment. . . . Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and when the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the State legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law."[1]

[1] It was held by the New York Court of Appeals, *In re* Tuthill, 163 N. Y. 133, 49 L. R. A. 781, that the provision of the New York constitu-

§ 400. **Assessment for Defraying Preliminary Expenses Sustained.**—An assessment, under the laws of Missouri, of twenty-five cents per acre on the lands within a drainage district for paying its preliminary expenses, was held valid.[1] In this case it was claimed that parties could not be subjected to this preliminary tax because their land would not be benefited by the drainage; but the Supreme Court said that the power of taxation should not be confused with the power of eminent domain; there was no requirement for a special assessment; nor must there be an equal benefit for every payment. In this case, the initial inquiry, whatever its result, was for the purpose of securing the reclamation of the lands of which the district was comprised; and in this inquiry all the owners were interested. To say that a tax could not be levied except as a result of an inquiry, would be to assert in effect that, as a preliminary tax, it could not be laid at all. In this case it seemed that the section had been passed after the district was organized; but the court said that was immaterial, as the statute which was in force at the time contemplated taxation to pay the preliminary expenses, which must be regarded as incident to the organization, for which the legislature was competent to provide in the exercise of its taxing power.

§ 401. **Public Improvements in Municipalities.**—The difficulty of the questions growing out of the essential difference between special assessments and general taxation is increased by the circumstances attending the demand for public improvements in the rapidly growing cities of the country. Costly pub-

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tion authorizing the drainage of agricultural lands by necessary ditches and dykes upon the lands of others, under proper restrictions and making just compensation, did not authorize the assessment of the expense of constructing a drain upon other land-owners deemed benefited thereby, as the constitution contemplated that the expense should be borne by the petitioners. But it was said that, if the constitution did authorize such an assessment, it would involve the taking of property without due process of law, in violation of the Federal Constitution, as it would be levying a tax for a private purpose.

[1] Houck v. Little River Drainage District, 239 U. S. 254, 60 L. Ed. 58 (1915), affirming 248 Mo. 373, holding valid Sec. 5538 R. S. Mo, 1909.

lic improvements, such as sewers and paved streets, are, in the nature of things, only possible where there are compact populations and high real estate values. In the actual or anticipated growth of cities, very often these improvements are forced upon localities where the property is not of sufficient value to pay for them, and the enforcement of special assessments involves practical confiscation.

The expansion of city populations over large areas through the application of electricity to rapid transit has increased these difficulties, as the diffusion of population, while promoting the health and comfort of the people, sometimes diminishes rental values in other sections and makes special assessments for street improvements a greater burden upon property. This same cause has enormously enhanced the expense of municipal government, and has rendered more difficult of determination the proportion of expense of public improvements, which should be paid by the property owners of the community at large. What might be fair and just in a compact community in a comparatively small space, may be very unfair and unjust in a sparsely populated area. There the same social and economic conditions which have increased the expense of municipal administration and which require that public improvements, if they are made at all, must be paid for by means of special assessments, make the property less able to carry the burden of such assessments.

Public improvements in municipalities are usually under the control of the municipal authorities, to whom the authority is delegated by the State to make such improvements at the cost of the property in the special taxing district created by the municipality therefor. Very often such improvements are made upon the demand of those who are not compelled to pay for them, and the discontent thus caused is not infrequently aggravated by a want of confidence in the municipal authorities. With the best possible municipal administration it requires careful consideration to determine what and when public improvements are required, and when property in a district is sufficiently benefited to justify the assessment of the necessary cost. It is inevitable therefore that under existing conditions the imposition of special assessments should frequently encounter the most vigorous resistance.

§ 402. **Difficulty of Determining Special Benefits.**—While the principle involved in the establishment of a taxing district in a city is the same as in the case of a drainage or irrigation district in the country, the application often raises different and difficult questions. Thus while in the case of a sewer the territory drained may be a natural benefited district, what rule can determine with any degree of accuracy what part of the benefits from a street improvement inures to the property fronting the street, what part to the property on intersecting streets, and what part to the general public using the street? It not infrequently happens that the cost of a paved street is wholly out of proportion to the value of the abutting property, and the improvement is demanded solely for the convenience of the public. Thus in the case of a park which is open to the general public, what rule can determine the limits of the district upon which the cost of opening the park shall be charged? It is obvious that the determination of the proportional benefits enjoyed by contiguous property on the one hand and by the general public on the other, or the apportionment of the benefits as between the property owners in the district, cannot be determined with precision and can at best be but approximate.

It is agreed that the only basis for the apportionment is the presumption of special benefit to the property to the extent of the tax assessed. As the exercise of the taxing power is legislative and not judicial, the determination of the necessity for the improvement and the basis of the apportionment is primarily legislative. The most serious legal difficulty, and the one upon which the courts have most widely differed, is as to the conclusiveness of the legislative determination in fixing the basis of apportionment, when this basis excludes the investigation of special benefits as to the individual property holders.

§ 403. **Apportionment of Cost of Municipal Public Improvements.**[1]—Different methods have been adopted for apportioning the cost of public improvements in municipalities.

[1] See Walston v. Nevin, 128 U. S. 578, 32 L. Ed. 544 (1888); *infra*, Sec. 373.

Thus when the taxing district is created, the proportion of benefits may be determined by a commission or other *quasi* judicial authority, or, as is more usual, a definite basis of apportionment may be established by the charter or ordinance of the municipality, according to the assessed value of the property in the district, or according to the frontage upon the street or other improvement, or upon the area within a designated district. Such legislative basis of apportionment, whether by assessed value or frontage or area is made upon the presumption that the special benefits are equally distributed through the district and are fairly apportioned on such basis.

Sometimes this apportionment by frontage or area is made the fixed rule of the city charter or statute, so that no discretion is left to the municipal authorities except in determining when the improvement shall be made, that is, when the conclusion is warranted that the special benefits to the property within the district will equal that part of the cost of the improvement to be taxed against such property. This method of fixing the basis of apportionment has the advantage of leaving as little as possible to the discretion of the municipal authorities. It also involves the disadvantage that the improvement, if made at all, must be made upon the basis prescribed by the charter, and there can be no modification to meet special and exceptional circumstances which may make the application of this basis inequitable in individual cases. Although the special benefit is the only admissible warrant for the assessment, the consideration of the question is liable, under this system, to be obscured by the general public convenience demanding the improvement.

Sometimes a fixed proportion of the cost of the work is required to be paid from the general fund of the city, and only a part levied upon the property specially benefited; while in other cases the entire cost is assessed as special benefits upon property within the district. In sewer construction both the area and frontage rules have been applied. In street improvement the frontage rule is generally used, sometimes in connection with the area rule so as to include property upon intersecting streets, presumably benefited by the improvement.

§ 404. **Special Assessments Under State Constitutions.**— It is not within the scope of this work to consider the questions arising in the different States, as to the construction of their own constitutions upon the power of the legislature to make assessments for local improvements. It is sufficient to state that the rule has been settled in nearly all the States, that special assessments for public improvements upon property specially benefited do not violate the constitutional requirement of uniformity and equality in taxation, or that property shall be assessed according to its value. Such provisions have been held to have no application to assessments based upon special benefits.[1]

In several States the earlier decisions to the contrary were subsequently overruled.[2] It was said by the Supreme Court[3] that it fully agreed with the Supreme Court of Louisiana in its construction of the constitution of that State requiring equality and uniformity in taxation, that it did not take away the power of making assessments for local public improvements. The court said, p. 295:

"We are of opinion that the construction given was correct. It is impossible to apply to the varying wants of a municipality the rule invoked with reference to taxation for State purposes on property throughout the State, without producing the very inequality which that rule was designed to prevent. There would often be manifest injustice in subjecting the whole property of a city to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied."

The court added that the same construction of a similar clause in the constitutions of other States had been adopted by their highest courts.

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[1] See 2 Dillon's Municipal Corporations, Sec. 752, where the State authorities are reviewed.

[2] Thus in Colorado, Denver v. Knowles, 17 Colo. 204, overruling Palmer v. Ray, 6 Colo. 106; in Maryland, *In re* Johns Hopkins Hospital, 56 Md. 1, overruling Baltimore v. Scharf, 54 Md. 499; in Alabama, Birmingham v. Klein, 89 Ala. 461, overruling Mobile v. Dargan, 45 Ala. 310. Early decisions in Minnesota and in Illinois were in effect overruled by changes in the State constitutions.

[3] Louisiana v. Pilsbury, 105 U. S. 278.

§ 405. **Legislative Discretion in Apportionment.**—While a few States still insist that the apportionment must be made according to a determination of special benefits in each case[1] the trend of authority has been overwhelmingly in support of the rule that a legislative apportionment by frontage or area is allowed. Thus it was said by Judge Cooley in the Supreme Court of Michigan in 1881:[2]

"We might fill pages with the names of cases decided in other States which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis (according to frontage) as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments and direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation have collected the cases and have recognized the principle as settled, and if the question were new in this State, we might think it important to refer to what they say. But the question was not new; it was settled for us thirty years ago."

Judge Dillon said in 1891, after reviewing the State cases:[3]

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvments is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency."

§ 406. **Consideration of Special Benefits Excluded by Legislative Apportionment.**—The apportionment of the cost of a

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[1] Peay v. Little Rock, 32 Ark. 31. The frontage rule was denied in McBean v. Chandler, 9 Heisk. (Tenn.) 349, as unequal and not uniform.

[2] Sheley v. Detroit, 45 Mich. 431, l. c., page 433.

[3] Dillon's Municipal Corporations, 4th Ed., Vol. 2, Sec. 752.

public improvement by a definite rule, as by frontage or area in the taxing district, has been held necessarily to exclude evidence of the want of special benefits in the enforcement of assessments upon the property, as the legislative determination in ordering the assessment upon that basis presumptively involves the finding that the property is benefited to the extent of the assessment.

This conclusiveness of the legislative decision in the formation of taxing districts is said therefore to rest upon the presumption that the legislature proceeds upon investigation and inquiry, and decides what the public good requires; that it only creates a taxing district and charges the expense of a public improvement upon it when satisfied that the property therein will be specially benefited by the improvement.[1] The courts in sustaining this doctrine of legislative conclusiveness, recognize that its real basis is the impracticability of making any satisfactory judicial apportionment of the benefits from such improvements as between the abutting property and the general public. In the language of the Supreme Court of North Dakota:[2]

"How could the courts ever determine what part should be paid out of the general treasury and what part raised by local assessment? What rule would govern them in investigating such a question? And what right have they to dictate where the line shall be drawn?"[3]

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[1] Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763 (1888), affirming 100 N. Y. 587.

[2] Ralph v. Fargo, 7 N. Dak. 640, l. c. p. 650.

[3] The difficulty of drawing the line between the general benefit to the public and the special benefit to the property owner is illustrated not only in street improvement cases but in such matters as street sprinkling. Thus it was held in Minnesota, State v. Reis, 38 Minn. 371, that *street sprinkling* is a public improvement for which a special assessment can be made; while in City of Chicago v. Blair, 149 Ill. 310, and 24 L. R. A. 412, and in New York Life Ins. Co. v. Prest, 71 Fed. 815, it was held that it is not a local improvement and that the conclusion of the local authorities that it is, is reviewable by the courts. See also Sears v. Boston, 173 Mass. 71, and 43 L. R. A. 834. *Street sweeping* was held a proper charge for local assessments in Reinken v. Fuehring, 130 Ind. 382, and 15 L. R. A. 624. The cleaning of ice and snow from a sidewalk

§ 407. **Legislative Power Not Unlimited.**—Notwithstanding this general acceptance of the doctrine that the apportionment of the cost according to a definite rule of presumed benefits is a matter of legislative discretion, excluding thereafter the judicial consideration of special benefits, it does not follow that the legislative authority in that regard is unlimited. On the contrary, this exclusion of the consideration of special benefits can only be justified on the theory that it had been determined by the municipal authorities upon investigation that the special benefits to each lot charged were equal to the assessment. Evidence of the want of special benefits is excluded only on the theory that the fact sought to be disproved has been conclusively determined in the proceedings in which the assessment was made. Thus it was said by the Supreme Court of Massachusetts:[1]

"While these assessments must be founded upon benefits, the courts have generally recognized the difficulty, and in many cases the impracticability, of attempting to estimate

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was held a proper local charge in New York, Carthage v. Frederick, 122 N. Y. 268, and 10 L. R. A. 178; and in Massachusetts, *In re* Goddard, 16 Pickering 504; but denied in Illinois, Gridley v. Bloomington, 88 Ill. 554; Chicago v. O'Brien, 111 Ill. 532. The Supreme Court of Pennsylvania in Hammett v. Philadelphia, 65 Pa. 146, held that the power to assess was exhausted with a single exercise for the same improvement, and maintenance and reconstruction must be a public expense. This was a street paving case and was reaffirmed in City of Erie v. Russell, 148 Pa. 384, in the case of a sewer. But in Missouri, McCormack v. Patchin, 53 Mo. 33, and Farrar v. St. Louis, 80 Mo. 379, the power was held to be a continuing power, unless expressly restrained by the constitution or by the charter of the city.

[1] Sears v. Boston, 173 Mass. 71, p. 78. The court in this case held valid an assessment for watering streets in proportion to the lineal feet as applied to occupied estates in the central portion of the city. It said that it made this decision with some hesitation, as waterng produces only a temporary effect, but concluded that the *habitual* watering was a benefit to the property. But it was held in another case, Sears v. Street Commissioners, 173 Mass. 350, that a sewer assessment which included, in addition to the cost of the sewer, part of the general expenses of the department, was invalid. See also 2 Dillon on Municipal Corporations, 4th Ed., Sec. 761.

benefits to estates one by one without some rule of principle of general application which will make the assessments reasonable and proportional, according to benefits. Accordingly, the determination of such a rule or principle by the legislature itself, or by the tribunal appointed by the legislature to make the assessments, has commonly been upheld by the courts. If, however, its effect plainly is to make an assessment upon any estate substantially in excess of the benefit received, it is set aside."

Other courts, sustaining legislative apportionment of special assessments, have been less decided in asserting this limitation of legislative authority; and the fundamental principle, that such assessments can only be justified in any case by the benefits received, has been obscured by the practical convenience of the legislative apportionment by frontage or area throughout the taxing district. Where the conditions of the parcels of land assessed are substantially uniform, as in average city lots, such apportionment by frontage or area works approximate equality. The recognition of this fact and the realization of the impracticability of judicial determining the special benefits led to the general adoption and enforcement of the rule that the legislative apportionment is conclusive, until the essential limitations of legislative authority were reasserted by the decision of the Supreme Court in Norwood v. Baker in 1898.[1]

§ 408. **Supreme Court on Assessments for Municipal Improvements.**—The Supreme Court can only consider this subject in relation to due process of law as guaranteed by the Fourteenth Amendment. Only on this ground can it overturn the system established by the State authorities and approved by the State courts. It cannot review the decisions of the State courts with reference to the construction of their own statutes and constitutions, and thus it has had no concern with the many questions which have arisen in that connection. Furthermore in questions so intimately related to the sovereignty of the State as the exercise of the State power in establishing taxing districts and apportioning the burden of taxation for the cost of

[1] *Infra*, Sec. 426.

public improvements, it would necessarily require a clear case of violation of right under the Federal Constitution, before the Supreme Court would interfere with the exercise of legislative discretion under the State laws as approved by the State courts. The Supreme Court has considered this question not only in cases from the State courts, where the protection of the Fourteenth Amendment was invoked,[1] but also in cases from the District of Columbia where the same claim was made in reference to the Fifth Amendment[2] restraining the power of Congress; and it will be convenient therefore to consider the decisions of the court in relation to the different classes of public improvements. It will be observed, however, that in cases from the District of Columbia, the court exercised a broader jurisdiction in determining the validity of the action of Congress in its powers over the District, than it assumed in reviewing the decisions of

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[1] Hagar v. Reclamation District, *supra*, Irrigation District v. Bradley, *supra*, Wurts v. Hoagland, *supra*, Davidson v. New Orleans, 96 U. S. 97, *supra;* County of Mobile v. Kimball, 102 U. S. 691, *supra;* Spencer v. Merchant, 125 U. S. 345, *supra;* Kerr v. South Park Commissioners, 117 U. S. 379, 29 L. Ed. 924 (1886); Walston v. Nevin, 128 U. S. 578, *supra;* Lent v. Tillson, 140 U. S. 316, 35 L. Ed. 419 (1891); Paulsen v. Portland, 149 U. S. 30, 37 L. Ed. 637 (1893), affirming 16 Oregon 450; Norwood v. Baker, *infra*, Sec. 426; Billingham Bay, etc., Co. v. New Wharcom, 172 U. S. 314, 43 L. Ed. 463 (1899); Loeb v. Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280 (1900), reversing 91 Fed. 37; French v. Barber Asphalt Co., 181 U. S. 324, *supra* (and following cases); Farrell v. West Chicago Park Commissioners, 181 U. S. 404, 45 L. Ed. 924 (1901), affirming 182 Ill. 250; Lombard v. Park Commissioners, 181 U. S. 38, 45 L. Ed. 731 (1901), affirming 181 Ill. 136; Carson v. Brockton Sewerage Co., 182 U. S. 398, 45 L. Ed. 1151 (1901), affirming 175 Mass. 242; King v. Portland, 184 U. S. 61, *infra*, Sec. 430; Voigt v. Detroit, 184 U. S. 115, 46 L. Ed. 459 (1902), affirming 123 Mich. 547; Goodrich v. Detroit, 184 U. S. 432, 46 L. Ed. 627 (1902), affirming 123 Mich. 559.

[2] Willard v. Presbury, 14 Wallace 676, 20 L. Ed. 719 (1870); Mattingly v. District of Columbia, 97 U. S. 687, 24 L. Ed. 1098 (1878); Shoemaker v. United States, 147 U. S. 282, 37 L. Ed. 170 (1893), affirming 19 Wash. L. R. 466; Bauman v. Ross, 167 U. S. 548, 42 L Ed. 270 (1897), reversing 24 Wash. L. R. 65; Parsons v. District of Columbia, 170 U. S. 45, 42 L. Ed. 943 (1898), affirming 8 App. D. C. 391; Wight v. Davidson, 181 U. S. 371, 45 L. Ed. 900 (1901), reversing 16 App. D. C. 371.

the Supreme Courts of the States. In the latter cases it was limited to the constitutional question, in the former it was not.

§ 409. **Supreme Court on Assessments for Sewers.**—In the matter of sewers there is a natural benefited district, to-wit, the territory drained, and as to such cases the courts have had little difficulty in accepting the conclusiveness of the legislative determination regarding the property benefited.[1] In Paulsen v. Portland, the Supreme Court held that in making a taxing district out of the area drained by a sewer, no notice to or assent by the taxpayer was necessary. The sewer in question was constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. So also it is for the legislature to determine the territorial district to be taxed for the local improvement.

In a case from Massachusetts the court held valid an ordinance making an annual assessment upon property owners for the use of a common sewer, which had been built by assessments upon the property benefited.[2]

In a case from the District of Columbia,[3] the court sustained an assessment, under Act of Congress, in the District of Columbia, where one-third of the cost of the sewer was taxed upon the property adjoining, according to frontage, for the enlargement of the sewer. In this case the assessment was confirmed by Act of Congress, which the court held was equivalent to an authorization, adding at p. 692:

"It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property at its discretion, is, under the decisions, no longer an open question."

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[1] Gillette v. City of Denver, 21 Fed. 822, Brewer, J.; Paulsen v. Portland, 149 U. S. 30, *supra;* Cleaneag v. Norwood, C. C. 137 Fed. 962 (1905).

[2] Carson v. Brockton Sewerage Commission, 182 U. S. 398, *supra.*

[3] Mattingly v. District of Columbia, 97 U. S. 687, *supra.*

§ 410. **Supreme Court on Assessments for Streets and Sidewalks.**—The same principle has been applied to the opening, widening, and paving of streets and sidewalks. Thus an assessment under the statute of New York making a taxing district of the lands lying within three hundred feet on either side of the street improved was sustained and held valid as to all parcels of land which were included within that district, though some of them did not front upon the street.[1] The court affirmed the judgment of the New York Court of Appeals, which had said in its opinion:

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason."

And the Supreme Court added:

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. . . . If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. . . .

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, al-

[1] Spencer v. Merchant, 125 U. S. 345, *supra*, and New York Court of Appeals, 100 N. Y. 587.

though it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.'"[1]

The Act of Congress for opening streets in the city of Washington and providing for apportioning one-half of the cost upon the lands found to be benefited was sustained as not violative of the Fifth Amendment.[2] The court said that it was for the legislature and not for the judiciary to determine, whether the expense of a public improvement should be borne by the whole city, or by the district, or by the property immediately benefited. The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be fixed in proportion to the frontage, area, or the market value of the lands, or in proportion to the benefits as estimated by the commissioners. It was within the power of Congress to include as benefited all lands lying within the benefited district, and Congress might submit the question of what parcels of land were benefited to the determination of the tribunal intrusted with the authority of making the assessment.

In a later case from the District of Columbia,[3] the validity of an act making an assessment at the rate of $1.25 per lineal foot upon property abutting on streets where a water main was laid was sustained by the Supreme Court, which held that the action of Congress was conclusive alike of the question of the necessity of the work and of the benefit to the abutting property. The court said in this case that there was an obvious necessity for a system to supply the inhabitants with a constant and unfailing supply of water, an essential for health, comfort and safety next in importance to air. The citizen cannot be heard to contend that he is entitled to receive such advantages gratuitously, nor that the laws and ordinances under which they are created and regulated are invalid, unless his individual and personal views have been formally obtained and considered.[4]

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[1] Justice Matthews and Justice Harlan dissented.

[2] Bauman v. Ross, 167 U. S. 548, *supra.*

[3] Parsons v. District of Columbia, 170 U. S. 45, *supra.*

[4] In Provident Institution v. Jersey City, 113 U. S. 506, 28 L. Ed. 1102 (1885), an act passed prior to the date of plaintiff's mortgage

§ 411. **Improvement Ordinance Not Invalidated by Restricting Work to Resident Citizens.**—An ordinance of New Orleans for street paving, providing that the contractor should not employ any other than *bona fide* residents of the city as laborers on such public work, was not violative of the constitutional right of a taxpayer justifying resistance to special taxation.[1] The court said that the objection to the cost of the work being increased, was too far-fetched and uncertain to furnish material for judicial determination, and in any event the objection could only be raised by a party directly affected thereby, that is, one of the non-resident laborers.

§ 412. **Right of Property Owner to Equitable Relief After Performance of Contract.**—Special tax bills for a public improvement will not be set aside after full performance of the contract, because of the acts of the agent of the contractor toward the securing of the contract, where no fraud or corruption is shown.[2]

In this case it was claimed that the specification of Trinidad Lake Asphaltum, the product of a foreign country, when there

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made water rents a charge upon lands in Jersey City, though at the date of the mortgage there were no valid water rents due on the mortgaged property. Plaintiff contended that the statutes, by giving a superior lien to water rents afterwards accrued, deprived it of its property without due process of law, but the court held that, since plaintiff took the mortgages subject to the statute, it had no ground to complain. And even if the mortgages had been created before its passage, the statute would be valid. That which is given for the betterment of the common pledge is in natural equity entitled to first place among the claims against it. Providing a sufficient water supply for the inhabitants of a great and growing city, is one of the highest functions of municipal government, and tends greatly to enhance the value of all real estate in its limits. It might be difficult, the court concluded, to show any substantial distinction between such charge for water and a tax, but the case at bar did not call for an opinion on that point.

[1] Chadwick v. Kelley, 187 U. S. 540, 47 L. Ed. 293, affirming 104 La. 719 (1903).

[2] Field v. Barber Asphalt Paving Co., 194 U. S. 618, 48 L. Ed. 1142 (1904), reversing 117 Fed. 925, and directing the dismissal of the bill of complaint.

were deposits in several of the United States from which suitable asphalt could be had did not constitute such an interference with interstate commerce as to justify the setting aside of the contract after the full performance of its terms. The court held that the charges of undue influences of the agents of the paving company did not show any fraud or corruption. The court said, however, that there might be cases of fraud or arbitrary abuse of power when the court would interfere. Under other circumstances the municipality and property owners interested are bound by the acts of their agents.

§ 413. **Benefit Districts for Street Improvements.**—A Kentucky statute authorized the city government of Louisville to open and improve streets at the exclusive cost of the owners of lots in each one-fourth of a square, to be equally apportioned by the council according to the number of square feet owned by them respectively, except that corner lots of prescribed dimensions paid twenty-five per cent more than others, each subdivision of territory bounded on all sides by principal streets being deemed a square. This statute had been sustained by the Kentucky Court of Appeals,[1] and its judgment was affirmed on motion by the Supreme Court, as the contention had been pressed upon them before and determined adversely, so that there was no necessity for its being argued.[2]

§ 414. **Special Assessments for Public Parks.**—It was said by the Supreme Court in a case from the District of Columbia,[3] involving an assessment for a public park established under Act of Congress for the District of Columbia, that in the memory of men now living the proposition to take private property without the consent of its owner for a public park and assess a proportionate part of the cost upon the real estate benefited would have been regarded as a novel exercise of the legislative power.

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[1] Preston v. Roberts, 12 Bush 57; Beck v. Obst, 12 Bush 268; Broadway Baptist Church v. McAtee, 8 Bush 508.

[2] Walston v. Nevin, 128 U. S. 578, *supra*. Another case of summary disposition was in Corry v. Campbell, 154 U. S. 629, *supra*.

[3] Shoemaker v. United States, 147 U. S. 283, *supra*.

But the adjudicated cases determine, not only that the establishment of a public park is a public use, but that the judicial function is exhausted when this question is decided, and that the extent to which such private property shall be taken for such use rests wholly in the legislative discretion.[1]

§ 415. If Assessment is Set Aside, Reassessment May be Made.—Where an improvement has been ordered and the assessment made to pay for it has been adjudged invalid or has proven ineffective for any reason, an act of the legislature authorizing a reassessment in the taxing district involves no violation of the rule requiring due process of law,[2] although the reassessment includes interest on the unpaid old assessments and part of the expense of levying them.

In a later case involving the validity of a reassessment by the West Chicago Park Commissioners under the laws of Illinois, it was said to be no longer open to question that, where a special assessment to pay for a particular park has been held to be illegal, no violation of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for the completed work.[3]

This principle, that the invalidity for any reason of a special assessment does not release the property from the obligation to pay its proper share of the cost of the improvement on the due ascertainment thereof by a reassessment lawfully made, is illustrated, in the case of Norwood v. Baker, *infra*, Sec. 426, where the assessment was set aside as wanting in due process of law. The court said that the legal effect of the injunction granted by it was only to prevent the enforcement of the particular assessment in question. It left the village in its discretion to take such steps as were within its power, either under existing stat-

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[1] Kerr v. South Park Commissioners, 117 U. S. 379, *supra;* Farrell v. West Chicago Park Commissioners, 181 U. S. 404, *supra;* Lombard v. West Chicago Park Commissioners, 181 U. S. 38, *supra.*

[2] Spencer v. Merchant, 125 U. S. 345, *supra.*

[3] Lombard v. West Chicago Park Commissioners, 181 U. S. 33, *supra;* Bellingham Bay Co. v. New Whatcom, 172 U. S. 314, *supra,* affirming 16 Wash. 131.

utes or under any authority which might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street, as was found upon due and proper inquiry to be equal to the special benefits accruing to the property.[1]

§ 416. **Reassessment Dependent on the Local Law.**—While it is well settled that a State may authorize a new special assessment on property benefited, to pay for completed work, where the original assessment has been held to be illegal or defective, of course, such right of reassessment is dependent upon the local law. Whether a municipal ordinance providing for such reassessment is valid, having regard to the State Constitution and laws, is wholly a State, and not a Federal question.

It was held[2] by the Supreme Court that the decision of the Supreme Court of the State, that it is competent on a new assessment to determine questions of benefit from the proof, even though in so doing a different result is reached from that which has been arrived at, when a former assessment which has been set aside is made, decides a local, and not a Federal, question.

In the absence of such duly authorized reassessment, it was held by the Circuit Court of Appeals, that no recovery can be allowed on a *quantum meruit* by a city against a property owner under the Iowa statute, which provided for such suit "notwithstanding any informality, irregularity, or defect of such municipal corporation or its officers," where the contract under which the work was done had been adjudged void by the Supreme Court of the State as beyond the constitutional power of the city. The court said that the purpose of such a provision was to prevent property owners from taking advantage of technical defense, when the municipality had exercised its powers in substantial conformity with law; but where a contract was adjudged void, it created no obligation, and conferred no authority on the city, in the absence of a statute authorizing

[1] Norwood v. Baker, 172 U. S. 269, l. c. 293, *infra.*

[2] Lombard case, *supra*, Sec. 416.

reassessment to make a special assessment against the abutting property for the cost of the work done through an action on a *quantum meruit*.[1]

§ 417. **Notice and Opportunity of Hearing.**—The general principle, that there must be some opportunity for hearing at some stage of the procedure, discussed in Chapter XI in relation to general taxation, applies with special force to local assessments and for the reason there explained, that assessments for special taxes are not made at stated periods as in general taxation, but whenever the legislative discretion determines that the improvement shall be made at local expense. There is therefore a necessity for notice and opportunity for hearing, which does not exist in the case of general taxation.

Wherever the cost of a public improvement is apportioned according to the judgment of commissioners or other tribunal as to the special benefits accruing to the property in the district, there must be notice and opportunity for hearing allowed to the taxpayer before such tribunal on the question of the benefits accruing to his property, and the amount of tax to be assessed against him.[2] It is not enough that he may by chance have notice, or as a matter of fact have a hearing. It is immaterial that the assessment has in fact been fairly apportioned. The constitutional validity of the law is to be decided, not by what has been done under it, but by what by its authority may be done.[3] The construction of the State statutes by the State courts as requiring notice will, however, be conclusive upon the Supreme Court.

But due process of law does not require in special assessments, any more than in general taxation, that there should be a formal or plenary judicial proceeding or any interposition of judicial authority. The assessment and collection of taxes, general and special, belong to the legislative and executive, and

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[1] See Allen v. Davenport, C. C. A., 8th Circuit, 132 Fed. 209 (1904).

[2] Hagar v. Reclamation District, *supra*, Sec. 319, and cases cited.

[3] Stuart v. Palmer, 74 N. Y. 183; St. Louis v. Ranken, 96 Mo. 497; Heth v. Radford, 96 Va. 272.

not to the judicial, departments of the government. Neither is a rehearing or new trial essential to due process of law.[1]

The general rules stated in Chapter XI as to the essentials of notice apply to special assessments, subject to the distinction stated, that there is a reason for notice and opportunity for hearing which does not exist in general taxation. The publication of a notice that it is proposed to present a petition for a public improvement is a sufficient notification to those interested in the question, when such notice carries with it an opportunity to be heard.[2]

§ 418. **Notice and Hearing Under Legislative Apportionment.**—When the apportionment is not made by commissioners or other *quasi* judicial authority, but by the legislature, such legislative determination may exclude any subsequent hearing upon the question determined. This question was decided by the Supreme Court[3] in affirming the judgment of the New York Court of Appeals. The court said that when the determination of the lands to be benefited is intrusted to commissioners, its owners may be entitled to notice and hearing upon the question whether their lands have been benefited, and how much. But the legislature has the power to determine by the statute imposing the tax what lands, which might be benefited by the tax, are in fact benefited by it, and if it does so, the determination is conclusive upon the owners and the courts. The owners in such case have no right to a hearing upon the question whether their lands are benefited, but only upon the validity of the assessment and its apportionment among the different parcels of the class decided upon by the legislature. This is in accordance with the general principle that there is no right to a hearing upon a question which has been determined by the exercise of legislative discretion.

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[1] See Chapter XI, "Essentials of Notice and Hearing." See also Lent v. Tillson, *supra*, Sec. 328; Paulsen v. Portland, 149 U. S. 30, *supra*.

[2] Fallbrook Irrigation District v. Bradley, *supra*, Sec. 362; Hagar v. Reclamation District, *supra*, Sec. 319.

[3] Spencer v. Merchant, *supra*, Sec. 375.

But this rule, that notice and hearing are not required where they can be of no effect, has been applied not only to the legislative creation of the taxing district and determination of what part, if any, of the total cost is to be assessed upon the district, but further to the decision by the legislature as to the basis of apportionment within the district, that is, whether according to special benefits, or value, or area, or frontage. Therefore, if that body concludes that the cost shall be assessed according to special benefits or according to value, the determination of such benefit or value requires notice and opportunity for hearing. But if the legislature determines for itself that an apportionment according to area, or according to frontage, corresponds to the benefits received, it follows that the calculation on that basis is a mere matter of figures, and no notice or hearing thereon is required.[1] It results therefore that the establishment of such a rule of area or frontage excludes the consideration of special benefits.

Theoretically this determination by legislative or municipal authority is made upon investigation of the special benefits accruing to all the property. But under the prevailing system of fixing the basis of apportionment in the charter or enabling statute, the municipal authorities have only the discretion of determining what and when improvements shall be made, and the theory of "presumed investigation" and "conclusive discretion" in the exercise of such municipal authority may practically deprive the property owner, not only of any judicial protection, but also of any hearing upon the question of benefits from the improvement.

This logical outcome of the premises was the occasion of the sharp division of the Supreme Court in the notable case of Norwood v. Baker.[2] Although that decision was subsequently limited to its "special facts," the re-examination of the funda-

[1] In Amery v. Keokuk, 72 Iowa 701, it was said: "It appears to have been quite uniformly held that where the only act necessary to ascertain the amount of the assessment upon the property is a plain mathematical calculation, and no discretion is left to the city council, no notice is necessary."

[2] *Infra*, Sec. 383.

mental basis of special assessments in this and subsequent cases has resulted as hereafter shown, not only in the reaffirmation of the salutary principle that the judicial authority is supreme in enforcing the limitations of the legislative power, but also in the enforcement of the right of the property owner to notice and opportunity for hearing upon the question of benefits at some stage before the municipal action makes the assessment a binding charge against his property.

§ 419. **Where Court Relief Denied, Some Hearing Essential.**—Where the law denies the land owners the right to object in the courts to an assessment for a street improvement, on the ground that the objections are cognizable only by the Board of Equalization, there must be something more than an opportunity to submit in writing to the City Council, sitting as a Board of Equalization, all objections to, and complaints of such assessment in order to satisfy the due process of law guaranteed by the Fourteenth Amendment.[1]

In this case the court said that the decision of the Supreme Court of Colorado, that the tax was assessed in conformity with the Constitution and laws of the State, was conclusive; but the court said that the law of Colorado denied the land owner the right to object in the courts to the assessment on the ground that the objections were cognizable only by the Board of Equalization; that when the legislature committed to some subordinate body the duty of determining whether, in what amount, and upon whom it should be levied, and of making its assessment and apportionment, due process of law required that at some stage of the proceedings, before the tax became irrevocably fixed, the taxpayer should have an opportunity to be heard, of which he must have notice, either personally, by publication, or by law, fixing the time and place of hearing. A hearing in its very essence demanded that the party should have the right "to support his contention by argument, however brief, and, if need be, by proof, however informal."

[1] Londoner v. City and County of Denver, 210 U. S. 373, 52 L. Ed. 1103 (1908), reversing 33 Colo. 104.

§ 420. **Hearing Not Essential for Party Only Contingently Liable.**—An Indiana statute providing that the creation of a taxing district for a street improvement extending back therefrom 150 feet, and that back-lying property, that is, property fifty feet distant from the street and within 150 feet, was so far benefited that it should be made liable if the abutting fifty feet proved insufficient to pay the cost of the improvement, was not violative of due process of law as to the back-lying property.[1] The court said this contention was based upon a misapprehension of the statute. The amount of the assessment was fixed for both owners at the same time, for the abutting owner and the back-lying owner, the latter, however, being only contingently liable.

§ 421. **Hearing Not Required Before Including Property in Benefited District.**—Due process of law does not require notice to the property owner nor an opportunity for hearing, before a legislative or municipal authority forms the taxing district and determines the maximum amount to be apportioned thereto, provided he is given notice and allowed a hearing as to the amount to be assessed against his own property, and it is provided by the statute or charter, as construed by the Supreme Court of the State, that the amount of taxes which may be assessed upon any given parcel shall not exceed the benefits thereto. This was determined by the Supreme Court in a case from Detroit,[2] where the court said that it was not necessary for the property owner to have notice of every step in the proceeding. It is sufficient if he is given a thoroughly efficient opportunity to be heard to test the legality of the charge upon him for it is only with the charge upon him that he is concerned, and of that alone can he complain. In the legality of that charge is necessarily involved the legality of all which precedes it and of which it is the consequence. This ruling, however, was based upon the finding of the Supreme Court of the State, that under the statute the amount of assessment upon any lot of land

[1] C. C. C. & St. L. Ry. v. Porter, 210 U. S. 177, 52 L. Ed. 1012 (1908), affirming 38 Ind. App. 226.

[2] Voigt v. Detroit, 184 U. S. 115, *supra*, affirming 123 Mich. 547.

could not exceed the benefits, and that, at the hearing allowed the property owner, he could show that this rule had been violated, and this showing would have relieved his land from the tax.

§ 422. **Notice to Parties Liable to be Assessed in Street Openings Not Required.**—Where a statute providing for the opening of streets or other public improvements requires notice to the parties whose land is to be taken for public use, and the damages paid for the property so taken are assessed as benefits against the property in a district which it is determined will be benefited by the improvement, the fact that there is no provision for giving notice to the owners of land liable to be assessed for the improvement by being included in such benefited district does not deprive them of their property without due process of law.

This was decided in another case from Detroit,[1] where it was argued that parties liable to be assessed for benefits are as much interested in the question as to the necessity of making the improvement and the amount of compensation to be paid for the land taken therefor as are the owners of the land taken, and that the same reasons for notice apply in the one case as in the other. But the court said:

"But whatever weight be given to these authorities, the law in this court is too well settled to be now disturbed, that the interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvements, in which they have no direct interest. The position of the plaintiffs in this particular would require a readjustment of the entire proceedings, and a determination of the property

[1] Goodrich v. Detroit, 184 U. S. 432, *supra*, affirming 123 Mich. 559. In support of complainant's contention the following cases were cited and referred to in the opinion of the court, Paul v. Detroit, 32 Mich. 108; Wells County v. Fahlor, 132 Ind. 426; State v. Fond-du-lac, 42 Wis. 287; Stuart v. Palmer, 74 N. Y. 183; Scott v. Toledo, 36 Fed. 385 and 1 L. R. A. 688.

incidentally benefited, before any proceedings are taken for the condemnation of land directly taken or damaged by such improvement. It might be argued upon the same lines that, whenever the city contemplated a public improvement of any description, personal notice should be given to the taxpayers, since all such are interested in such improvements and are liable to have their taxes increased thereby. It might easily happen that a whole district or ward of a particular city would be incidentally benefited by a proposed improvement, as, for instance, a public school, yet to require personal notice to be given to all the taxpayers of such ward would be an intolerable burden. Hence it has been held by this court that it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have prior notice."

It will be observed, however, that this only applies to the notice and hearing before the taxing district is made. After the improvement is ordered and the taxing district determined, the right of the property owner to notice and hearing on the question of the validity of the charge against him remains, and is determined upon the principles discussed in the preceding section.

§ 423. **Express Finding of Benefits Not Required.**—Although the power to make special assessments upon property for public improvements is based upon the assumption that such property is specially benefited to the amount of the assessment, and the statute may authorize such assessment only upon a prior determination that the property assessed will be thus benefited, it is sufficient that the proceedings show a substantial compliance with this requirement. Due process of law, in the matter of special assessments as in other cases, looks to substance rather than to form. Thus a statute of Michigan provided that if the common council believed that a portion of the city would be benefited by a certain improvement, they might determine that the whole or any just proportion of the cost of the improvement should be assessed, etc., upon the real estate deemed to be thus benefited, and thereupon they should by resolution fix and determine the portion of the city benefited, and specify the amount to be assessed upon the owners of the real estate therein. It

was held[1] that a resolution that the "common council do hereby fix and determine that the following district is benefited and that there be assessed upon the several parcels of real estate therein the amount of —— dollars in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement," was a substantial if not a literal compliance with the statute. The court said that, whether it was a compliance or not, there was no want of due process of law, because under another provision of the statute, as construed by the Supreme Court of the State, the property owner was entitled to a hearing, wherein he could insist that his property was not benefited at all.

§ 424. **Enforcement of Special Assessments.**—The subject of procedure in tax collection, as discussed in Chapter XI, applies also to special assessments which are levied and collected under the taxing power.[2] The rule requiring due process of law is complied with, if the taxpayer has a hearing as to the validity of the charge upon his property, at any stage of the proceedings. Thus if the assessment can only be enforced by a plenary suit or a more summary form of judicial procedure, and the taxpayer is allowed an opportunity to set up any defense as to the legality of the charge, the requirements of due process of law are satisfied. In some States the taxpayer is allowed to appear before the council or other municipal authority, and make his objections both as to the necessity of the improvement, and also to the apportionment of benefits between the city and the district. Then, in a suit to enforce the collection of the assessment, he is limited to questions relating to the performance of the work, and such limitation when notice and opportunity for hearing are afforded before the work is done, is no violation of due process of law.

It was said in a recent opinion of the Supreme Court,[3] in a suit to enjoin the collection of an assessment for opening a street, that the plaintiff could not urge as a ground of injunc-

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1 Goodrich v. Detroit, 184 U. S. 432, 439, *supra*.

2 Speer v. Athens (Geo.), 9 L. R. A. 402.

3 Goodrich v. Detroit, 184 U. S. 432, *supra*.

tion that the lands in the condemnation proceeding were defectively described. Not only was it a collateral matter so far as plaintiff was concerned, but it is extremely doubtful whether a simple misdescription involves any Federal question whatever.

But it was held in a State court[1] that a clause of a city charter, providing that the owner of real estate should, within sixty days from the date of the issuance of the tax bill, file with the Board of Public Improvements a written statement of all his objections to the validity of the bill, and that in a suit on the tax bill no objection should be pleaded other than those which had been so filed, was void as a deprivation of property without due process of law, and that plaintiff could make all the defenses to the tax bill allowed by law regardless of such provision. The court said in this case that there is a distinction between requiring a man, who proposes taking same affirmative legal action, to do so within a limited time and requiring him to state in advance his defenses to a future suit. The law does not compel a man who is unassailed to pay any attention to unlawful pretenses which are not asserted by possession or suit.

§ 425. **Conclusiveness of State Determination.**—In the determination of any question of fact such as the necessity for a public improvement, the amount of special benefit accruing to the district, or valuations in the apportionment of special assessments the decision of the proper State tribunal, in the absence of actual fraud and bad faith, is conclusive.[2] Erroneous decisions on questions of fact submitted to such tribunals do not violate any provision of the Federal Constitution.[3] Even bad faith or fraud on the part of State officials making the assess-

[1] Barber Asphalt Paving Co. v. Ridge, 169 Mo. 376 (1902).

[2] It was held in California, Ramish v. Hartwell, 126 Cal. 443, that while the legislature had no power to make the recitals of bonds issued, payable from proceeds of special assessments, conclusive evidence of the validity of the lien for street improvements, the recitals could be made conclusive evidence of the regularity of the proceedings not essential to jurisdiction of the officers to create the assessment.

[3] Fallbrook Irrigation District v. Bradley, 164 U. S. 112, l. c. 167, *supra;* see also Lent v. Tillson, 140 U. S. 315, *supra.*

ment involves no constitutional element, and the remedy therefor depends upon the ordinary jurisdiction of courts of justice over that class of cases. When the matter comes before the Supreme Court on writ of error to the highest court of the State, only the Federal question can be considered, and the court in considering that question is concluded by the construction of the State statute by the State court.[1] The same rule, that the State court's construction is conclusive, applies if the case is construed by the Supreme Court on appeal from the United States District Court.

§ 426. **Supreme Court in Norwood v. Baker.**—The principle of the conclusiveness of legislative determination in fixing the basis of apportionment in special assessments and the exclusion of any consideration of special benefits in the enforcement of special assessments upon such statutory apportionment, which seemed to have become thoroughly intrenched in American jurisprudence, received a severe shock from the decision of the Supreme Court in the case of Norwood v. Baker, decided in 1898 on appeal from the United States Circuit Court, Southern District of Ohio.[2]

The constitution of Ohio authorized the taking of private property for the purpose of making public roads, on paying to the owner compensation to the amount assessed by a jury without deduction for benefits. The statutes of Ohio provided, in case of the opening of a new road, for a special assessment by the front foot upon bounding and abutting property of the entire cost and expense of the improvement, making no provision for the consideration of special benefits. A street was opened through the property of complainant three hundred feet long

[1] For a forcible illustration of this see King v. Portland, 184 U. S. 61, *infra;* Voigt v. Detroit, *supra*, Sec. 422; Goodrich v. Detroit, *supra*, Sec. 422.

See also Schaefer v. Werling, 188 U. S. 516, 47 L. Ed. 570, affirming 156 Ind. 704 (1903), where it was held that the question whether a municipality, by refusing to hear objections to a public improvement, was estopped to collect any portion of the cost thereof from the objector, was not a Federal question which could be reviewed on writ of error to a State court.

[2] 172 U. S. 269, 43 L. Ed. 443 (1898), affirming 74 Fed. 997.

and fifty feet wide, to connect two streets of that width which ran from each end of complainant's property in opposite directions. The jury gave plaintiff $2,000 damages, irrespective of any benefits. The village then assessed her with the cost of opening and making this street, including the solicitors' and experts' fees and advertising, in all $2,218. Complainant brought suit to restrain the village from enforcing the assessment. The sum awarded by the jury had been paid to the plaintiff, and it was this sum with costs and charges which the village was undertaking to assess back upon her. The Circuit Court granted a decree to plaintiff on the ground that the assessment was in violation of the Fourteenth Amendment, providing that no State should deprive any citizen of his property without due process of law.

The Supreme Court, after holding that the taking of plaintiff's land for the street was under the power of eminent domain, and that abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property, said, by Justice Harlan,[1] that such assessments were special burdens imposed for special or peculiar benefits accruing for public improvements; and if the State constitution did not prohibit it, the legislature might create a new taxing district and determine what property should be included and what should be considered benefited; but the legislative power was not unlimited. It was one thing for the legislature to prescribe as a general rule that property abutting on a street opened by the public should be deemed to have been especially benefited by the improvement, and should specially contribute to the cost; but it was quite a different thing to lay down an absolute rule that such property, whether benefited or not, could be assessed by the front foot for a fixed sum representing the cost of the improvement, and without any right in the property owner to show that the sum was in excess of the benefits. The exaction from the owner of any sum in substantial excess of the special benefits, was the taking of private property for public use without compensation.

It was not necessary for plaintiff, the court said, to show the

[1] L. c., p. 278.

excess of cost over her special benefits, as the assessment was by the front foot irrespective of special benefits, so that the assessment was illegal in itself, because it rested upon a basis which excluded any considerations of benefits. The decree enjoining the whole assessment was therefore the only proper one. But the injunction did not prevent a reassessment for such amount as could be assessed against the property upon a due and proper inquiry as to the special benefits accruing.

The court added that the assessment was also invalid under the constitution of Ohio which required that compensation be made for private property taken for public use, and that such compensation be assessed without any deduction for benefits to the property of the owner. This provision would be of little practical value if, upon the opening of a public street through private property, the owner could be assessed, not only for an amount equal to the benefits received, but also for such additional amounts as would meet the excess of expense over the benefits.[1]

§ 427. **Norwood v. Baker in State Courts and United States Courts.**—So firmly had the rule of legislative conclusiveness become established in the different States that this decision in many places put a stop to public work, especially in localities where the area and frontage rules were established by statute of city charters excluding the consideration of special benefits in individual cases.[2] The Supreme Court of the District of Columbia held that the decision invalidated all procedures which did not provide a judicial inquiry as to special benefits.

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[1] Justice Brewer, with whom Justice Shiras and Gray concurred, dissented on the ground, among others, that when a public improvement has been made, it is, beyond question, a legislative function to determine conclusively the area benefited thereby. The opinion of the majority, he said, went so far as to hold that the legislative determination is not conclusive, and that in all cases there must be a judicial inquiry as to the area in fact benefited, adding: "We have often held the contrary, and I think should adhere to those oft-repeated rulings."

[2] Fay v. Springfield, 94 Fed. 409; Loeb v. Trustees, 91 Fed. 37; Charles v. Marion City, 98 Fed. 166; Cowley v. Spokane, 99 Fed. 840; Davidson v. Wight, 16 D. C. App. 371; Lyon v. Tonawanda, 98 Fed. 361; Parker v. Detroit, 103 Fed. 357.

In some of the State courts this construction was given to the decision, while others limited the case to the special facts, involving both the power of eminent domain and the right of assessment for public improvements, and held that their method of apportionment of costs by the area and frontage rules did not necessarily come within the scope of the judgment. The latter was the decision in Missouri,[1] Michigan,[2] North Dakota,[3] Illinois,[4] Pennsylvania,[5] New York,[6] California,[7] Wisconsin,[8] and Kentucky.[9] In Indiana[10] it was held by the Supreme Court that a statute, which authorized the improvement of a street and the assessment of the cost under the frontage rule, was made valid by the allowance to property owners of opportunity for a hearing as to special benefits, the frontage rule being considered to raise only a *prima facie* standard. It was said, however, that prior to the decision in Norwood v. Baker the ordinance would have been held invalid without the provision for hearing.

The Supreme Court of Massachusetts held[11] that the assessment upon the property-owners of the expense of watering the streets under the frontage rule was approximately an accurate method of determining the benefits, and therefore distinguished the case from Norwood v. Baker.

The Supreme Court of Minnesota,[12] following Norwood v. Baker, held that the principle involved was not confined to a street opening case, but extended to all cases of local public improvements; that the real principle involved was that of having

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1 French v. Barber Asphalt P. Co., 158 Mo. 534.

2 Cass Farm Co. v. Detroit, 124 Mich. 433.

3 Webster v. Fargo, 9 N. Dak. 208.

4 Farrell v. West Chicago Park Commissioners, 182 Ill. 250.

5 Harrisburg v. McPherran, 200 Pa. 343; *aliter*, Scranton v. Levers, 9 Pa. Dist. 176.

6 Conde v. City of Schenectady, 164 N. Y. 258.

7 Hadley v. Dague, 130 Cal. 207.

8 Gleason v. Waukesha Co., 103 Wis. 225.

9 City of Augusta v. McKibben, 22 Ky. Law Rep. 1224.

10 Adams v. Shelbyville, 154 Ind. 467.

11 Sears v. Boston, 173 Mass. 71.

12 Ramsey County v. Robt. P. Lewis Co., 53 L. R. A. 421, l. c. p. 423.

a basis of apportionment upon the abutting property, which should exact contribution only in consideration of special benefits, and that this appeared from the dissenting opinion of Justice Brewer. The court therefore held invalid the assessment of the annual frontage taxes for water pipes laid in front of the lots assessed, saying:

"Prior to the appearance of the case of Norwood v. Baker, perhaps the trend of the decisions in this country was in support of the theory that the legislative power in respect to special assessments was practically unlimited, and since that case was decided, the State courts have not been agreed as to its scope and meaning. Probably no decision emanating from the Supreme Federal Court for many years has been so sweeping and at the same time so imperfectly understood and applied."

The court said in concluding, at page 427:

"The stake driven by the decision in Norwood v. Baker is timely. Judicial expression on the subject was indefinite. There was a tendency to lose sight of the equitable basis which justifies the assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final without regard to its justice. It is to be hoped that the highest court of the land has spoken finally and will not recede from its position."[1]

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[1] After the above decision was announced, the Supreme Court decided the case of French v. Barber Asphalt Paving Co., and the other cases in 181 U. S., *infra*. Thereupon the Minnesota court, by the same judge, on June 18, 1901, sustained a motion for rehearing and reversed the former decision, saying that if the case was one of final jurisdiction of that court it would adhere to its former opinion. But after considering the decision of the Supreme Court in French v. Barber Asphalt Paving Co. and the other cases concurrently decided, wherein that court attempted to qualify and limit the principles applied in Norwood v. Baker, it was in doubt as to the effect of these holdings. It did not appear that the Supreme Court had directly denied the soundness of the rule announced, yet it seemed to intend to hold that "the principle will not apply when in conflict with the systems of taxation as adopted by a State, unless, in some special case, peculiar and extraordinary hardship is the result. In other words, it is not the prin-

§ 428. **Norwood v. Baker Limited to Its "Special Facts."**— But the far-reaching character of the decision in Norwood v. Baker and the widely different judicial views as to its effect resulted in a number of cases from different parts of the country, involving the validity of systems of procedure under the area and frontage rules of apportionment. These were appealed to the court, and having been advanced upon the docket, were heard together at the October term, 1900. One of them[1] was from Missouri, wherein the Supreme Court of that State had declined to apply the doctrine of Norwood v. Baker to tax bills levied according to the frontage rule for street improvements in Kansas City. Another had been appealed from a similar decision upon the frontage rule by the Supreme Court of the

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ciple or rule of assessment which is the test of the validity of the State act, but, rather, the effect of the application of the rule in particular cases. It may be a sound rule in one case, and not in another. It would be useless at this time to further attempt to define the position of the Federal court as expressed in its later decisions." The court said that its own decisions had sustained this method of assessment, State v. Robert P. Lewis Co., 72 Minn. 87 and 42 L. R. A. 639. It therefore reversed its decision, being influenced by the fact that the property owner might have its final conclusion reviewed by the Supreme Court of the United States on writ of error, but if it adhered to its former decision the judgment would be conclusive. 53 L. R. A. 428.

The decision in Norwood v. Baker was followed and applied in Texas, Hutcheson v. Storrie, 92 Texas 685, and 45 L. R. A. 289, where the frontage rule to the exclusion of special benefits was held invalid. But in Ohio, Schroder v. Oerman, 47 L. R. A. 156, the court refused to declare a frontage assessment invalid, holding that the Norwood case did not control, because it appeared that an issue was made by the pleadings, whether the land assessed was in fact benefited, which issue was found by the trial court against the complainant, and furthermore it was neither shown nor claimed that the expense was not fairly apportioned between plaintiff's property and other property affected by the assessment. It was not necessary that the council's proceedings should show affirmatively that the question of benefit to the lands was taken into consideration in the levying of the assessment.

[1] French v. Barber Asphalt Co., 181 U. S. 324, *supra.*

State of North Dakota.[1] The others were two frontage rule cases, one from the Supreme Court of Michigan[2] and the other from the Supreme Court of Illinois,[3] and an area rule case, involving the construction of a sewer, from the Supreme Court of Missouri.[4]

In all of these cases the State courts had affirmed the validity of the tax bills or tax procedure, declining to apply the rule of Norwood v. Baker, so that in each case a writ of error was taken out by the party affirming that he was deprived of his property without due process of law. At the same time there were presented to the court cases appealed from the United States Circuit Courts in the Northern District of New York[5] and the Eastern District of Michigan,[6] wherein those courts had enjoined the enforcement of the frontage rule, and also a case from the Court of Appeals of the District of Columbia,[7] which had applied the rule of Norwood v. Baker, under the Fifth Amendment to the Constitution and held invalid the procedure established by Act of Congress for the opening and improvement of streets in that jurisdiction. In all of these cases the Supreme Court, opinion by Judge Shiras, held that the tax assessments apportioned according to the frontage and area rule, with no hearing as to special benefits, involved no deprivation of property without due process of law; that the case of Norwood v. Baker was to be "limited to its special facts" and was not intended to establish the principle, indeed it did not necessarily import, that the assessment of the cost of a local improvement against abutting property according to frontage was invalid unless the law provided for a preliminary hearing as to the benefits to be derived by the property. The court said its

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[1] Webster v. Fargo, 181 U. S. 394, 45 L. Ed. 912 (1901), affirming 82 N. W. (N. Dak.) 732.

[2] Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. Ed. 916 (1901), reversing 103 Fed. 357.

[3] Farrell v. West Chicago Park Commissioners, 181 U. S. 404, *supra.*

[4] Shumate v. Heman, 181 U. S. 402, 45 L. Ed. 922 (1901), *supra.*

[5] Tonawanda v. Lyon, 181 U. S. 389, 45 L. Ed. 908 (1901).

[6] Detroit v. Parker, 181 U. S. 399, 45 L. Ed. 916 (1901).

[7] Wight v. Davidson, 181 U. S. 371, *supra.*

legal effect was only to prevent the enforcement of the particular assessment in question, adding, p. 345:

"That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in Parsons v. District of Columbia, 170 U. S. 45, 56, and in Spencer v. Merchant, 125 U. S. 345, 357.

"It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property, without due process of law. And such, in the opinion of the majority of the judges of this court, was the nature and effect of the proceedings in the case of Norwood v. Baker."[1]

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[1] Justice Harlan with Justices McKenna and White dissented in a vigorous opinion. As Justices Shiras and Gray concurred in the dissenting opinion of Justice Brewer in Norwood v. Baker, it follows that Justices Fuller, Peckham and Brown, who concurred in the opinion in Norwood v. Baker, concurred also in these decisions limiting it to its "special facts." It was said in the dissenting opinion, pp. 352, 353: "Does the court intend in this case to overrule the principles announced in Norwood v. Baker? Is it the purpose of the court, in this case, to overrule the doctrine that taxation of abutting property to meet the cost of a public improvement—such taxation for an amount in substantial excess of the special benefits received—will, to the extent of such excess, be a taking of private property for public use without compensation? That taxation of abutting property to meet the cost of a public improvement or any substantial excess of the special benefits is, to the extent of such excess, a taking of private property for public use without compensation? The opinion of the majority is so worded that I am not able to answer these questions with absolute confidence. It is difficult to tell just how far the court intends to go. But I am quite sure, from the intimations contained in the opinion, that it will be cited by some as resting upon the broad ground that a legislative determination as to the extent to which land abutting on a public street may be specially assessed for the cost of paving such street is conclusive upon the owner, and that he will not be heard, in a judicial tribunal or elsewhere, to complain, even if, under the rule prescribed, the cost is in substantial excess of any special benefits accruing to his property, or even if such cost equals or exceeds the value of the property specially taxed."

The court said, in the frontage case from Kansas City, that there was no showing of any difference in the value of the lots abutting on the improvement, and that the procedure followed had been orderly, under the scheme of local improvements prescribed by the legislature and approved by the courts of the State as consistent with constitutional principles.

In the case from the District of Columbia[1] the court stated that the District Court erred in deciding that it was intended, in the Norwood case, to overrule Bauman v. Ross and Parsons v. District of Columbia. It by no means necessarily followed that the construction consistently put upon the Fifth Amendment, maintaining the validity of the Acts of Congress relating to public improvements within the District of Columbia, was to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment in controlling State legislation. The court held also that the District Court erred in its construction of the opinion in Norwood v. Baker, and that it was "limited to its special facts."[2]

In another series of cases,[3] wherein the Circuit Court for the Northern District of New York under authority of Norwood v. Baker had granted an injunction restraining the enforcement of an assessment for grading and paving a street according to the frontage rule, the court said, at p. 391, in reversing the judgment of the Circuit Court, the same judges dissenting:

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[1] Wight v. Davidson, *supra.*

[2] The same Justices dissented, Justice Harlan saying that he could not understand what was meant by "special facts" or an "actual deprivation of property," and concluded as follows, p. 388:

"I submit that if the present case is to be distinguished from Norwood v. Baker, it should be done upon grounds that do not involve a misapprehension of the scope and effect of the decision in that case. If Congress can, by direct enactment, put a special assessment upon private property to meet the entire cost of a public improvement made for the benefit and convenience of the entire community, even if the amount so assessed be in substantial excess of special benefits, and therefore, to the extent of such excess, confiscate private property for public use without compensation, it should be declared in terms so clear and definite as to leave no room for doubt as to what is intended."

[3] Tonawanda v. Lyon, 181 U. S. 389, *supra.*

"It was not the intention of the court, in that case (Norwood v. Baker), to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States. The purpose of that amendment is to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress. The case of Norwood v. Baker presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships,' amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment."

In yet another of the series of cases, it was said in the prevailing opinion:[1] "We agree with the Supreme Court of North Dakota in holding that it is within the power of the legislature of the State to create special taxing districts and to charge the cost of a local improvement in whole or in part upon the property in said districts, either according to valuation or superficial area, or frontage, and that it was not the intention of this court in Norwood v. Baker to hold otherwise."

§ 429. **Municipal Bonds Payable from Assessments Held Valid Notwithstanding Invalidity of Assessment.**—It is a common practice for municipalities, when authorized by statute or charter, to provide for the payment of assessments for local improvements in annual installments, and in some States bonds are issued by the municipality payable from the proceeds of the assessments. The Supreme Court decided,[2] in a suit growing out of the decision in Norwood v. Baker, *supra,* Sec. 426, that

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[1] Webster v. Fargo, 181 U. S. 395, *supra.*

[2] Loeb v. Columbia Township Trustees, 179 U. S. 472, *supra.* In Warner v. City of New Orleans, 31 C. C. A. 5th Cir. 238, 87 Fed. 829 (1898), defendant had purchased the drainage system then in process of construction from the contractor, paying therefor in warrants and covenanting to facilitate the application of the drainage assessments to the payments of the warrants. The city abandoned the work, and

the invalidity of the method of assessment adopted did not invalidate the bonds provided for in another section of the same statute, and therefore constituted no defense to the municipality in a suit upon the bonds. The Ohio statute, under which the assessment was made which was held invalid in Norwood v. Baker, provided in another section for the issue of township bonds, which were payable from the proceeds of the assessments, as they were paid in five annual installments provided by the statute. The township refused to pay these bonds, setting up among other defenses that the law under which the bonds were issued had been held void by the Supreme Court in Norwood v. Baker, and this defense was sustained by the United States Circuit Court. The decision was reversed in an opinion by Justice Harlan, with no dissent. It did not follow, said the court, that, because the assessment was invalid, in that it precluded inquiry in respect to special benefits, the township could escape liability on the bonds. The power to issue the bonds to raise the money, and the mode in which the township should raise the necessary sums to pay the bonds when due, as well as the interest accruing thereon from time to time, were distinct and separable matters. It was admitted that there was some ground for saying that the legislature would not have passed the act without the section providing for assessment by the frontage rule; but the court thought that this was not so manifestly the case as to justify the refusal to execute the valid part of the statute, when that could be done in harmony with the intention of the legislature to have the improvement in question made by the township, and the cost met by issuing bonds.

It was argued that the bonds were payable only out of the proceeds of the assessment, and on this point the court said, p. 490:

"The relief asked and the only relief that could be granted in the present action, is a judgment for money. If the township should refuse to satisfy a judgment rendered against it,

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the State court decided that the assessments were not collectible because the property assessed would not be benefited. On appeal the city was held estopped to deny the validity of the assessments and was liable to account for the fund as if collected.

and if appropriate proceedings are then instituted to compel it to make an assessment to raise money sufficient to pay the bonds, the question will then arise whether the mode prescribed by the third section of the act of 1893 can be legally pursued; and if not, whether the laws of the State do not authorize the adoption of some other mode by which the defendant can be compelled to meet the obligations it assumed under the authority of the legislature of the State. All that we now decide is that, even if the third section of the State statute in question be stricken out as invalid, the petition makes a case entitling the plaintiff to a judgment against the township. Whether a judgment if rendered could be collected, without further legislation, depends upon considerations that need not now be examined."

The enforcement of such a judgment would depend upon the construction of the statute authorizing the issue of the bonds, that is, whether the statute provided that the special assessments alone should be applied to the payment of the bonds, or the bonds were general obligations of the township with a special charge upon the proceeds of the assessments.[1] A judgment upon such bonds has the effect of a judicial determination that the demand of the judgment creditor is valid and what amount is due him, but it gives him no new rights in respect to the means of payment. This would depend, as stated, upon the construction of the statement under which the bonds are issued.

§ 430. **Supreme Court in King v. Portland.**—In striking contrast with the division of the court in Norwood v. Baker and in the subsequent limitation of that case to its "special facts," was the unanimous opinion of the court sustaining the enforcement of a special assessment under the frontage rule in the city of Portland, Oregon. The opinion in this case was delivered by Justice McKenna, who concurred in the opinion in Norwood v. Baker, and in the dissent of Justice Harlan in the subsequent limitation of that case to its "special facts."[2]

[1] See United States v. Ft. Scott, 99 U. S. 152, 25 L. Ed. 348 (1879); United States v. County of Macon, 99 U. S. 582, 25 L. Ed. 331 (1879).

[2] King v. Portland, 184 U. S. 61, 46 L. Ed. 431 (1902), affirming 38 Oregon 402. The official syllabus is significant: "Under the facts of this case and the interpretation given to the charter of the city of

The charter of Portland provided that the city council should have no authority to improve any streets, until they should pass a resolution of intention so to do describing the improvement and this resolution should be posted and published for ten days, the notice stating the fact of the passage, the character of the work proposed and the time within which written objections or remonstrances would be received. If remonstrances were not filed by a majority of the property owners, the common council was to be deemed to have acquired jurisdiction. When the work should be substantially completed, the city engineer must file with the board of public works a written acceptance of the completed work. The board was then to advertise the place and time when objections to the improvement might be heard, and any person might at that time appear and object to the acceptance. If there were no objections, or if the objections were overruled, the board was to report to the council, and thereupon an assessment was to be made and the cost apportioned, so that each lot abutting on the street should be liable for the full cost of making the improvement upon one-half of the street in front and abutting upon it and also its proportionate share of improving the intersections of two streets.

The Supreme Court said that the finding of the State court had narrowed their inquiry. It must be accepted as true that the improvement was a benefit to the abutting property equal to the cost of the improvement, and that the council apportioned the cost according to the benefits. Their inquiry was therefore confined to the validity of the rule of assessment and the question whether the plaintiffs in error were afforded an opportunity to contest the assessment.

Upon the question of notice, it was found that the charter as construed by the State court provided for successive notices of the proposed improvement, the inviting of proposals for doing the work, touching the acceptance of the work and the entry of the assessment. Ample opportunity was thus afforded the

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Portland by the Supreme Court of the State of Oregon, this court is of the opinion that the plaintiffs in error have not been deprived of their property without due process of law."

owner to appear and interpose the constitutional objections.

It was strongly urged that the basis of apportionment was itself invalid, in that it made no taxing district but considered each lot by itself, compelling each to bear the burden of the improvement in front of it without reference to any contribution to be made by other property. Accidental circumstances might cause the greater part of the cost to be expended in front of a single lot, although those circumstances might not at all contribute to make the improvement more valuable to the lot thus specially burdened, but perhaps even have the opposite consequence.

But the court replied:

"'If accidental circumstances' may take from the rule the effect of apportionment, they do not prevent the application of the rule to cases where such circumstances do not exist. Where they exist they can be properly dealt with. Presumably the rule of the Portland charter was prescribed by the legislature in view of the conditions which existed in that city and in the expectation that the common council would so exercise its power and judgment in the creation of districts that the cost of the improvement ordered would be apportioned by the application of the rule prescribed. The expectation has been justified by the experience of the city. Under the rule of the charter, the opening and grading of the streets have been done for years, and the courts have been watchful against abuses,—watchful to protect the rights of property owners."[2]

[2] The opinion in this case cites the opinion in Oregon and Cal. Railroad Co. v. Portland, 25 Or. 229 and 22 L. R. A. 713, as illustrative of the point that "accidental circumstances" would warrant the courts in protecting the property owner. The court there enjoined the enforcement of an ordinance for a special assessment levied upon the frontage rule to pay for the construction upon a street of an elevated roadway. It said that the presumption was that the council had done its duty, but that this presumption was overcome by the fact that the rule prescribed in the particular case was so grossly and palpably unjust and oppressive as to show that the proper authority had never determined the case on the principles of taxation. It was proven that the property was so situated it could receive no benefit from the improvement, which had never been used by the public or by the plaintiffs, and, the court found, never would be, so that there was no foundation for the exercise of discretion by the council.

§ 431. **Assessment Lawfully Levied for Benefits Already Accrued.**—A special assessment may be levied upon an executed consideration, that is, for a public work already done. There was, therefore, no objection that the special assessment levied was for special benefits long since accrued, and that the statute was retrospective in its operation.[1] In this case it was also said that it was no objection that the complainant and others were given no opportunity to be heard as to the amount of benefits conferred upon them, and the proper adjustment of tax, as the assessment and classification of the property were fixed and designated by legislative act, which provided that the property which had been improved by paving, should, according to the width of the paving in front of their respective properties, be assessed at a certain sum per foot. Such a tax, when levied by the legislature, did not require notice and hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law.

In this case, Norwood v. Baker was relied upon; but the court said that that case must be read in connection with the subsequent cases in the court. The court also said:

"We do not understand this to mean that there may not be cases of such flagrant abuse of such legislative power as would warrant the intervention of a court of equity to protect the rights of land owners because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law, would certainly be available to persons arbitrarily deprived of their private rights by such State action, whether under the guise of legislative authority or otherwise."

§ 432. **Eminent Domain and Special Assessments.**—It appears from the opinion in Norwood v. Baker, as also in the subsequent discussion of that opinion, both in the Federal and State courts, that the condemnation of property for public use, and the requirement of due process of law in connection there-

[1] Wagner v. Lesser, 239 U. S. 207 (1915), 60 L. Ed. 230, affirming 120 Md. 671 (1904), following Seattle v. Kelleher, 195 U. S. 351, 49 L. Ed. 232 (1904).

with, was involved in that case as well as the constitutional limitation of the law of special assessments. It will be observed that these two subjects are involved in many cases of public improvements, that is, in all cases where property is actually taken for public use.

In cases from the District of Columbia, the Supreme Court considers such cases under the Fifth Amendment, which provides not only that no person shall be deprived of life, liberty, or property without due process of law, but also that private property shall not be taken for public use without just compensation.

It has been seen that a lawful public purpose is necessary in the condemnation of private property for public use, analogous to that required in the exercise of the taxing power.[1]

In discussing the assessment of damages for the opening of an alley in the city of Washington, the Supreme Court intimated that a form of assessment that would be valid for a case of paving, would not be valid for the more serious expenses involved in the taking of land. The court held that it would construe the statute as providing that the apportionment of the damage was to be limited to the benefit to each property owner, as it appeared that the jury had understood their duty to be to divide the whole cost among the land owners, whether the benefit was equal to their share of the cost or not.[2]

§ 433. **Legislative Power and Special Facts.**—It is clearly established by these recent decisions of the Supreme Court that the legislative power, broad and comprehensive as it is in taxation, is not unlimited and is not beyond the reach of judicial review and scrutiny. The rule thus laid down in the case of special assessments is substantially the same which has been declared in regard to the requirement of a public purpose in general taxation or in the enforcement of limitations upon the legislative

[1] *Supra*, XII.

[2] Martin v. Dist of Columbia, 205 U. S. 135, 51 L. Ed. 743 (1907), affirming 26 App. D. C. 140, 146, on writs of *certiorari*, quashing the assessments below.

power of classification. These are primarily legislative questions and the courts, especially the Federal courts, will only in extreme cases review the exercise of that discretion. Thus it is primarily for the legislature to determine whether a tax is levied for a public purpose. But as was seen in the preceding chapter, cases are not wanting in which such legislative declaration or finding has been overruled by the courts. It is primarily a legislative function to determine what is a reasonable classification for taxation, but this determination is subject to judicial review.

In assessments for local improvements, the questions of the necessity for the public improvement and the benefit to the district charged therewith are legislative and not judicial. Thus the legislature may determine that the property drained by a sewer or the property fronting on or contiguous to a street shall pay the expenses of the improvement. But if a municipality under legislative authority should undertake to make property which is not drained by a sewer part of a special taxing district to pay for its construction,[1] or, when not located on a street or contiguous thereto, part of a taxing district for its improvement, such action would be a clear abuse of legislative authority.

The same principle applies to the method of apportionment as between different parcels of property included in the taxing district. It is settled in these recent cases that it is within the legislative power to establish a fixed basis of apportionment, as between different parcels of property included in the taxing district. It is settled in these recent cases that it is within the leg-

[1] See Sears v. Street Commissioners, 173 Mass. 350. It was held in Missouri, Johnson v. Duer, 115 Mo. 366, that the fact that part of the land in a sewer district could not be drained by the sewer was not a valid objection to a special assessment to pay for such sewer on the part of persons whose land was drained by it. And in a recent case, Heman v. Schulte, 166 Mo. 409, decided January, 1902, it was held that, in a suit on a special tax bill for sewer construction, it was not a valid defense that the property was so situated in the sewer district that it could not connect with the sewer except through intervening property over which it had no control.

islative power to establish a fixed basis of apportionment, such as area or frontage, provided it is first determined in each case by the legislative authority that the method adopted would produce approximately equality and that the resulting benefits would equal the cost apportioned to the several property owners.

This is clearly established by the opinion of the Supreme Court of Oregon, which is quoted in the opinion of the Supreme Court in King v. Portland, p. 67, where the court, after describing the roadway and the method of apportionment and showing that the cost of the work was practically uniform throughout, so that the assessment according to frontage was as nearly proportional according to the benefits as could be devised, says:

"At least it is not apparent that there is any substantial excess of costs above benefits, nor is there such a disproportionate distribution of the burden as to justify the courts in declaring the assessment an arbitrary exaction by the legislature. It is beyond the power of human ingenuity to adopt any plan or mode of assessment that will operate to produce exact uniformity, and all that may be expected is a reasonable approximation to such a standard, and the rule adopted under the charter fulfills the condition as applied to the present controversy. There is no doubt that the property was benefited in excess of the costs and expenses."

And in the same case it was said by the Oregon Supreme Court, after reviewing the decisions of the Supreme Court, including Norwood v. Baker:

"But we are inclined to believe that the better doctrine, deducible from adjudged cases, including those of the Supreme Court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners."

§ 434. **Accidental or Exceptional Circumstances.**—If the rule of apportionment produces approximate equality as between the different parcels of property in the district, the fact

that it may work injustice in the case of any one or more parcels in consequence of exceptional or accidental circumstances will not render it invalid, but the rule will be enforced in the cases where it may be applied and where such circumstances do not exist. This was directly decided in the case last cited, where the Supreme Court, after quoting the language of the Oregon court given above, said: "We infer that the plan or method of assessment must have that result of itself. If that result is produced by a particular application of the plan or method, the latter will not be enforced." In other words, in case of the failure in any particular case of the plan which gives approximate equality in the district, the court may grant relief, as was done in Oregon, etc., R. R. Co. v. Portland, *supra*, Sec. 430 note. In the language of the Supreme Court, "where such circumstances exist, they can be properly dealt with." The law on this subject is clearly summarized by the Supreme Court of Oregon, which, after speaking of the presumptive validity of the assessment as quoted above, continues as follows:[1]

"This must be so, logically and necessarily, in view of the broad latitude accorded the legislature, in its discretion, to prescribe the taxing district and the manner and method of making the assessment within the district, as it concerns individual owners and proprietors. As the writers say, the authority of the legislature in these respects is almost without limit; yet that there is a limit beyond which it cannot go, all will concede. When, however, it has exercised its legislative discretion, and prescribed a district and adopted a method, it ought to be plain and indisputable that it has exceeded its constitutional authority, before the court should undertake to set at naught its declared will. Neither ought the system to be condemned because there may be exceptions wherein it would work a legal injury to enforce it."[2]

§ 435. **Requirements of "Due Process of Law."** — "Due process of law," therefore, in special assessments requires, not necessarily a judicial hearing as to special benefits, but some

[1] King v. Portland, 38 Oregon 402, l. c. p. 429.

[2] See also Ballard v. Hunter, 204 U. S. 241, 51 L. Ed. 461 (1907), affirming 74 Ark. 174.

hearing before some authority on the question, and this opportunity for hearing must be given before the action is taken which makes the assessment binding upon the property, unless, in the enforcement of the assessment by suit, the taxpayer is allowed to contest the question of benefit. The municipal authorities may apportion the assessment by a uniform rule such as frontage or area, but this can only be done after determination that the benefits to the property will equal the assessment.

Thus is the statute under which the village authorities proceeded in the case of Norwood v. Baker, had provided for notice and hearing before them on the question of benefits, and they had thereupon determined that the benefits to the Baker property from the opening of the street would equal the assessment apportioned thereto, it is difficult to see how the assessment could have been set aside under the rule declared in King v. Portland. The ownership by one person of the entire tract through which the street was opened would not of itself affect the validity of the assessment, neither would the fact that the amount assessed included the costs of the condemnation as well as the cost of the land appropriated, if it was determined that the amount of benefit equaled the aggregate cost. The real difficulty in the case was that the procedure was based on the arbitrary assertion that the legislative action was conclusive, regardless of the determination of benefits.

§ 436. **Property Incapable of Benefit, Not Lawfully Assessable.**—Notwithstanding the broad scope of the legislative power in ordering public improvements, and in designating property in taxing districts, it is also true that where property is so situated that it cannot be benefited by the proposed improvement, there is an abuse of power violative of due process of law in attempting to assess such property for benefit. This was forcibly illustrated in a drainage case from Louisiana.[1] In this case, an island which was included in a drainage district, which was the highest assessed property in the district, but which the court

[1] Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, 60 L. Ed. p. 392 (1916), reversing 134 La. 903.

found never could, or would receive any benefit whatever from the system, could not lawfully be assessed for such improvement. The court said it was true that the law of the State as written was not attacked, but it was sufficient that the law, as administered and justified by the Supreme Court of the State, was involved, and that it presented a clear Federal question.

The same principle was applied in a street improvement case from St. Louis where, under the city charter, one-fourth of the special assessment for street improvement was levied against land fronting upon or adjoining the improvement, and three-fourths proportionately against all the land lying in the benefited district, to be fixed as provided by the charter, this benefited district being specifically described in the charter, and the effect, owing to the fact that property was not laid out into city blocks, was to include in the taxing district property which could not derive benefit from the improvement. The court held that the inclusion of this property, not upon any consideration of difference in benefits, but mechanically in obedience to the criterion of the charter to be applied, was violative of due process of law.[1]

The court said that the legislature could create taxing districts to meet the expense of public improvements, and fix the basis of taxation, unless its action was plainly arbitrary or oppressive. If there was no reasonable presumption that substantial injustice would be done, if the probabilities are that the parties would be taxed disproportionately to each other and to the benefit conferred, the law could not stand against the complaint of one so taxed in fact.

§ 437. **Municipal Bonds for Local Improvements.**—Under the laws of some States, municipal bonds are authorized to be issued for the cost of local improvements. The authorization of the issuance of such bonds, although they contain no stipulation limiting the recourse of their holders to a special tax levied for such improvements, carried a general liability of the city issu-

[1] Gast Realty Co. v. Schneider Granite Co., 240 U. S. 54, 60 L. Ed. 523 (1916), reversing 259 Mo. 153.

ing them. This rests upon the principle that what the law requires to be done can only be done by taxation, this taxation is authorized to the extent it may be needed, unless otherwise it is expressly declared.[1]

The officers of a municipality are authorized and required to levy and collect taxes to pay such bonded indebtedness, and this judgment establishes a perfect cause of action for a writ of mandamus requiring them to perform their duties in levying such taxes for the payment of the judgment.[2]

§ 438. **Jurisdiction of Equity.**—A property owner who permits improvements for which his property was subject to assessment to be made under a contract, containing provisions which increases its cost, without objection, the cost, however, being within the assessment of benefits, and who does not offer to pay his share of the just cost, has no standing in a court of equity to enjoin the collection of any part of the assessment. This was ruled in a case where the work was payable in installments, and the statute provided that on an application for judgment on any subsequent installment, no defense except as to the legality of the pending proceeding and amount to be paid, or actual payment, should be made or heard. In such a case the judgment in the first proceeding is conclusive of the validity of the assessment.[3]

It was said in the case cited that the decision of the Supreme Court of a State holding the local improvement is valid under the State constitution, is binding on the Federal court in a suit on the assessment made after such decision was rendered; and decisions approving and applying its provision, although made after such improvement, will be held valid, unless made under exceptional circumstances.

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[1] United States *ex rel.* Kilpatrick v. Capdevielle, C. C. A. 5th Circuit, 118 Fed. 809. *Certiorari* denied, 189 U. S. 510, citing City of Quincy v. United States, 113 U. S. 332.

[2] United States *ex rel.* Masselick v. Saunders, C. C. A. 8th Circuit, 124 Fed. 125 (1903).

[3] Treat v. City of Chicago, 125 Fed. 644, C. C. A. 7th Circuit, 130 Fed. 443 (1904), affirming 125 Fed. 644.

The equity jurisdiction conferred on the Federal courts is the same as that possessed by the High Court of Chancery in England, and is universal throughout the States and is not subject to limitation or restraint by State legislation.[1]

In this case where complainant had no knowledge of certain proceedings by the city to condemn property for public uses, and to assess the cost thereof on an adjoining district, until after the time for appealing from the assessment had expired, he was held not guilty of laches. But at the same time it was held that he had an adequate remedy at law in the State court, and therefore the bill was dismissed without prejudice.

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[1] Union Pac. R. Co. v. Flint, West. D. of Mo., 180 Fed. 565 (1910).

CHAPTER XIV.

DUE PROCESS OF LAW AND THE JURISDICTION OF THE STATES.

§ 439. Tax must be levied upon subjects within jurisdiction of State.
440. Limitation of taxing power by jurisdiction not dependent on Fourteenth Amendment.
441. The taxable jurisdiction of State over land.
442. Assessment of land without deduction of mortgage, not violative of due process of law.
443. Jurisdiction of State in taxation of property.
444. Jurisdiction of State for taxation over property in bonded warehouses.
445. A State has no taxing jurisdiction over property in foreign warehouses.
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495. Question one of construction and not of legislative power.
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497. State construction of legislative authority conclusive.
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§ 439. **Tax Must be Levied Upon Subjects Within Jurisdiction of State.**—Due process of law requires, not only that the tax should be for a public purpose, but also that it should be levied upon subjects of taxation which are within the State's lawful jurisdiction. In taxation, as in all judicial proceedings,

the power of the State must be exercised within its jurisdiction. It was said by the Supreme Court[1] that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

This fundamental basis of the taxing power was clearly stated by Justice Field in the opinion in the Foreign Held Bond Case.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

§ 440. **Limitation of Taxing Power by Jurisdiction Not Dependent on Fourteenth Amendment.**—This limitation of the taxing power of the State to its lawful jurisdiction obviously does not depend upon the Fourteenth Amendment. The opinion quoted made no reference to the amendment. Like the limitation which requires that the tax shall be levied for a public purpose, this limitation by jurisdiction also is inherent in the conception of a tax. Prior to the adoption of the Fourteenth Amendment this limitation of the taxing power of the State was enforced by both the State and Federal courts. A tax by a State upon property

[1] 15 Wall. 300, l. c. 319, 21 L. Ed. 179 (1873), reversing Supreme Court of Penn. See Sec. 459, *infra*.

without its lawful jurisdiction is clearly a taking of property without due process of law, and may also be obnoxious to other provisions of the Constitution of the United States, such as the national control over interstate commerce. It may be a tax upon the property or instrumentalities of the United States, or violative of the privileges and immunities of citizens of other States, impair the obligation of contracts or deny the equal protection of the laws. But whether such taxes contravene other provisions of the Constitution or not, they are clearly contrary to the requirement of due process of law.

The taxing power of the State may be conveniently treated with reference to three distinct subjects of taxation, enumerated by Justice Field in the opinion just cited, *property, business* and *persons.* A State tax, to be valid and to constitute due process of law, must be levied upon property, business or persons within its jurisdiction.

§ 441. **The Taxable Jurisdiction of the State Over Land.**— There can of course be no question of the power of the State to tax all real property within its limits, as such property is obviously within the jurisdiction of the State. This is essential in a conception of a sovereign State. It is so universally accepted that it is seldom that any judicial controversy arises involving this jurisdiction of the State. Thus where a court held that the land in controversy, an island in the Mississippi River, was not part of the State of Arkansas, but under the sovereignty of the State of Mississippi, this judgment determined the taxability of the land under the laws of Mississippi.[1]

Where the laws of Idaho exempted from taxation irrigation canals and ditches and appurtenant water rights used by the owner exclusively for the irrigation of lands owned by him, such exemption was limited in its application to cases where the land, on which the water was used, was situated within the State.[2]

[1] Moore v. Maguire, 142 Fed. 787 (1906).

[2] Spokane Valley L. & W. Co. v. Kootany County, Idaho, Dist. Ct. of Id., 199 Fed. 181 (1912). Lands lying between the middle of New York Bay and the low water line on the New Jersey shore, are taxable by New Jersey, notwithstanding the provisions of a compact between

The taxable jurisdiction of a State extends to the State boundary, and if that boundary is the middle of a stream, it extends to the lands under the water, if that is under private ownership.

§ 442. **Assessment of Land Without Deduction of Mortgage, Not Violative of Due Process of Law.**—There was no violation of due process of law in the enforcement of a tax in the city of New York upon land without any deduction for the mortgage thereon. In other words, under the Federal Constitution, a man owning land subject to a mortgage, can be taxed for the full value of the land, while at the same time the mortgage debt is not deducted from his personal estate,[1] whereas, in New York parties are entitled to deduct their indebtedness in the assessment of their personal property. The court said it was immaterial that the party was not assessed for personal property. It was argued that the mortgagor's taxable property interest in the land was restricted to the contingent interest over and above the interest of the mortgagee. The court said, however, that the taxation of land was not based upon such a division of interest, but was essentially a proceeding *in rem*. Taxation, said the court, in most communities is a long way off from a logical and coherent theory, and as this mode of taxation was of long standing and upon questions of constitutional law "the long settled habits of the community play a part as well as grammar and logic."

§ 443. **Jurisdiction of State in Taxation of Property.**—It is also clearly established that all property, movable as well as immovable, actually located within the confines of the State, is subject to its taxing power, except of course property reserved therefrom under the constitutional provisions already considered. The fiction which plays so important a part in other

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the States fixing the boundary line as the middle of New York Bay, approved by Act of Congress, June 28, 1834, by which New York is given "exclusive jurisdiction of and over all the waters of the Bay of New York." Central R. R. of N. J. v. Jersey City, 52 L. Ed. 896, 209 U. S. 472 (1908), affirming 72 N. J. Law 311.

[1] Paddell v. State of New York, 211 U. S. 446, 53 L. Ed. 275 (1908), affirming 187 N. Y. 552.

branches of the law, that movable property has its *situs* at the domicil of the owner, has no application to the power of the State to subject all property, movable and immovable, within its limits, to taxation. Movables actually located in the State, therefore, may be taxed there, though the owner may be domiciled elsewhere. Thus Story says:[1]

"The general doctrine is not controverted that, although movables are for many purposes to be deemed to have no *situs* except that of the domicil of the owner; yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

This principle of public law has been repeatedly declared by the Supreme Court in relation to the taxing power of the States. In Coe v. Errol,[2] it was argued that the logs claimed to be in transit through New Hampshire were taxed to their owners in Maine as part of their general stock in trade. But the court held that this would have no influence on the decision of the question whether they were taxable in New Hampshire, saying, at page 524:

"We have no difficulty in disposing of the last condition of the question, namely, the fact (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State, which taxes him for that property as part of his general estate attached to his person, this action of the latter State does

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[1] Story's Conflict of Laws, 7th Ed., Sec. 550.

[2] 116 U. S. 517, *supra*, Sec. 132.

not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary."

§ 444. **Jurisdiction of State for Taxation Over Property in Bonded Warehouses.**—As a State has the power to tax private property having a *situs* within its territorial limits, it may require the party in possession of property stored in warehouses therein to pay the taxes thereon. It is also within the power of the State to require the proprietor of the warehouses to pay the taxes on such property, as liquors stored therein, although there is no specific provision giving the proprietor, who pays the taxes, the right to recover interest thereon; and under Federal legislation, distilled spirits may be left in a warehouse for several years; and for spirits so in bond negotiable warehouse receipts have been issued. The court said that these facts did not affect the question of the power of the State. A State is under no obligations to make its legislation conformable to the contracts, which the proprietors of bonded warehouses may make with those who store spirits therein, but it is their business, if they wish further protection than the lien given them by the statute, to make their contracts accordingly.[1]

§ 445. **A State Has No Taxing Jurisdiction Over Property in Foreign Warehouses.**—A State, however, cannot tax warehouse receipts for whiskey or other commodity deposited in a foreign warehouse, and it cannot acquire such jurisdiction by the presence of the warehouse receipts for such property within the State. This was ruled in a Kentucky case where the State claimed to recover back taxes on whiskey deposited in a German warehouse, although it was claimed that the owner domiciled in the State had shipped such property to Germany and reshipped to himself or to purchasers in the United States in order to evade taxation, using the warehouse receipts as collat-

[1] Carstairs v. Cochran, 193 U. S. 10, 48 L. Ed. 596 (1904), affirming 95 Md. 488. See also Thompson v. Kentucky, 209 U. S. 340, 52 L. Ed. 822 (1908), affirming 29 Ky. Law Rep. 705, holding valid the Kentucky statute making warehousemen liable for the tax, and giving him a lien on the property for the amount paid.

erals, and trading in them. It was held by the Kentucky court that while the whiskey was beyond the taxing powers of the State the tax was sustainable upon the warehouse receipts, but the court ruled that this was error, as the whiskey was beyond the taxing jurisdiction of the State. The warehouse receipt only imported that the goods were in the hands of a certain kind of bailee, and were not the symbol of the goods in any sense that warranted any basis for taxation. Assuming, as the Kentucky court did, that the whiskey was exempt, as under the Constitution of the United States, the protection of the constitution extended to the warehouse receipts locally present within the State.[1]

§ 446. **State May Tax Money and Securities in its Jurisdiction of Non-resident Owners.**—Where personal property is located within the State, whatever its form, whether evidences of debt or otherwise, it may be subjected to the State's taxing power, irrespective of the residence of the owner. Thus the State may establish an independent *situs* for taxation of bonds, mortgages and other securities of non-resident owners, located in its jurisdiction.

This principle was applied in the Supreme Court in a case from Louisiana, where certain notes and mortgages, which had been inherited by a citizen of New York from a citizen of Louisiana, but were in the possession of an agent, in New Orleans, were declared taxable in Louisiana.[2] The court said that the maxim *mobilia sequntur personam,* was at best only a legal fiction, and that there had been frequent recognition of the power of a State to separate, for the purpose of taxation, the *situs* of personal property from the domicil of the owner. As to the remark in the State Tax on Foreign Held Bonds Case, that personal property consisting of bonds and mortgages generally had no *situs* independent of the owner, the court said:

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[1] Sellinger v. Kentucky, 213 U. S. 200, 53 L. Ed. 761 (1909), reversing 30 Ky. Law 451.

[2] New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174 (1900).

[3] *Infra,* Sec. 456.

"This last sentence, properly construed, is not to be taken as a denial of the power of the legislature to establish an independent *situs* for bonds and mortgages, when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their *situs* to be that of the domicil of the owner, a declaration which the legislature has no power to disturb, when in fact they are in his possession."

The court also declared that there was nothing in the case of Kirtland v. Hotchkiss,[1] conflicting with these decisions. It was there held that "a State might tax one of its citizens on bonds belonging to him, although such bonds were secured by mortgage on property situated in another State," and it was assumed that the *situs* of such intangible property was at the domicil of the owner, as there was no legislation in that State attempting to set aside that general rule in respect to the matter of *situs*.

It was further said that, while, in the absence of statute, bills and notes are treated as choses in action and are not subject to levy and sale on execution, yet by the statutes of many States they are made so subject to seizure and sale, as any tangible personal property. And the opinion concluded, p. 322:

"It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay —evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation."

The same principle was applied[2] where the estate of a nonresident of Minnesota, who had loaned to residents of that State large sums upon notes and mortgages, which were in the posses-

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[1] *Infra*, Sec. 483.

[2] Bristol v. Washington County, 177 U. S. 133, 44 L. Ed. 701 (1900).

sion of a resident agent, was held properly chargeable with taxes on these securities.[1]

§ 447. **Property in Hands of Resident Agents Subject to Taxing Power.** — In the case of New Orleans v. Stempel, *supra,* the notes, mortgages and bonds were in the possession of the local administrator. But the principle has been applied in numerous cases where money of non-residents has been placed in the hands of *resident* agents for permanent investment and reinvestment.

Thus it was held in a leading case in Vermont, Catlin v. Hull,[2] decided in 1849, that notes, mortgages, etc., in hands of a local agent belonging to a non-resident, had a taxable *situs* in that State, the court saying in an opinion by Judge Poland:

"We are not only satisfied, that this method of taxation is well founded in principle and upon authority, but we think it entirely just and equitable, that, if persons residing abroad bring their property and invest it in this State, for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefits and advantages of our laws for the protection of their property, their property should yield its due proportion toward the support of the government, which thus protects it."

And the court, referring to a qualifying provision of the statute which is notable for its regard to interstate comity in taxation, added:

"And as this power of taxation in this State is only to be exercised in cases, where such property is not shown to be taxed to the real owner, where he resides, we think, that there is no reason for saying, that this power has been attempted to be exercised in an unjust spirit, or that its exercise shows any want of proper comity in our State government."[3]

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[1] See also McCutchen v. Rice County, 7 Fed. 558 (1881).

[2] 21 Vt. 152 (1849).

[3] More recent judicial utterances in other States do not show this solicitude lest the State be accused of want of "proper comity" in taxation. See Sec. 489 *et seq.*

This principle was approved by the Supreme Court, not only in New Orleans v. Stempel[1] but also in Bristol v. Washington County.[2] In the latter case a citizen of New York had, for many years, kept a sum of money invested in Minnesota, through a local agent. It was held that this investment was subject to taxation in Minnesota and that the amount of the tax was a claim against the property of the owner, which, after his death, could be proved against his estate in that State. The court therefore directed the Circuit Court to enter judgment for the amount of the taxes which were unpaid, and which were not barred by the statute of limitations of the State. In its opinion it cites a decision of the Supreme Court of Minnesota, which had held that this property was taxable in the State.[3] The latter court in its opinion said:

"Corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its *situs* where it is owned,—at the domicil of the creditor. The creditor, however, may give it a business *situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business."[4]

So clearly established is this right to tax such property at the place of its actual investment and employment, that it was said by the New York Court of Appeals:[5]

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[1] *Supra*, Sec. 446.

[2] *Supra*, Sec. 446; see also Walker v. Jacks, 31 C. C. A. 462, 88 Fed. 576, 6th Cir. (1898).

[3] *In re* Jefferson, 35 Minn. 215 (1886).

[4] To the same effect are State *ex rel.* Taylor v. St. Louis County Court, 47 Mo. 594 (1871); People v. Trustees, etc., 48 N. Y. 390 (1872); Wilcox v. Ellis, 14 Kan. 588 (1875); Board of Supervisors v. Davenport, 40 Ill. 197 (1866). In the last case the decision is apparently placed on the ground that the owner of the property had a business residence in Illinois. But it appears to have been a case of actual employment of the property in the State where taxed, and is therefore clearly in line with the other cases cited.

[5] People *ex rel.* Jefferson v. Smith, 88 N. Y. 576 (1882).

"It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills and notes have for many purposes come to be regarded as property and not as the mere evidences of debts, and that they may thus have a *situs* at the place where they are found like other visible tangible chattels."

The court held that under the New York statute, which taxed "all lands and all personal estate within" that State, a citizen of New York could not be taxed on money invested in notes and mortgages held by his agents in another State. They said, in reference to the case of Kirtland v. Hotchkiss,[1] that, while the State *could* have authorized the taxation of these securities at the domicil of the owner, according to their construction of the statute, the legislature did not intend to do so, and that a more accurate statement of the doctrine of that case would be to say, that a debt *may* have its *situs* at the residence of the creditor and *may* be there taxed. In other words, the distinction was between the existence of the State power to tax, and the actual exercise of the power.[2]

§ 448. **Jurisdiction for Taxation of Credits Not Dependent Upon Residence of Agent or of Debtors.**—While the presence of a resident agent is of service in enabling the State to exercise its power of taxation, its jurisdiction does not depend upon that fact, but upon the actual situation of the property in the State. It may be difficult to localize the property for taxation where there is no resident agent, but that does not affect the question of the jurisdiction of the State when the locality is fixed.

Thus it was said by the Supreme Court of Indiana,[3] that the test as to where the right to tax property exists is the place of its location and use. If property is held, owned and used in Indiana, it is taxable there, and this is true whether the business in which it is used is conducted by the owner in person or by

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[1] Sec. 483.

[2] See *infra*, Sec. 496.

[3] Buck v. Miller, 147 Ind. 586 (1896), and 37 L. R. A. 384.

some one else for him. It is accordingly quite immaterial whether the notes or other obligations subjected to the taxing power of the State have been executed by citizens of the State or non-residents.[1]

§ 449. **Credits Due Foreign Life Insurance Companies.**— As foreign life insurance companies do business in the State and maintain local offices therein through the comity of the State, loans made by them through such business offices and notes made in the regular course of business are subject to State taxation, where the interest is collected in the State, though the notes are held at the home office in another State.[2]

But where the loans made by a foreign life insurance company to its policy holders, though represented by notes, are in fact charged against the reserve value of the borrowers' policies under an agreement in the policies for the extinguishment of the debt by deducting the amount of the loans with interest from the amount of any claim under the policy, such loans cannot be subjected to taxation by the State in which the borrowing policy holder resides.[3] It was said in this case that the Louisiana tax laws would not be construed by the Federal courts as taxing bank deposits of a foreign life insurance company made solely for transmission to its home office, and not used or drawn

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[1] The court said that the contrary contention suggests a most excellent plan by which the holders of this class of property might escape taxation altogether. "For example, let those in Ohio convert all their means into bonds, stocks, notes and mortgages issued and executed by residents of Ohio, and let those in Indiana invest likewise in bonds, stocks, notes and mortgages, issued and executed by residents of Indiana; and then let the holders of the Ohio securities move to Indiana, and the holders of the Indiana securities move into Ohio, and it is done. Those wealth-movers must, however, be careful not to bring their domicil along with them. They may, of course, indeed they must, live and do business in the State into which they move; but they should be cautious to have their residence and domicil elsewhere."

[2] Metropolitan Life Ins. Co. v. Louisiana Board of Assessors, 205 U. S. 395, 51 L. Ed. 853 (1907), affirming 116 La. 698.

[3] Board of Assessors v. New York Life Ins. Co., 216 U. S. 516, 54 L. Ed. 597 (1910), affirming 158 Fed. 462.

against by any one in Louisiana, in the absence of any decisions of the Louisiana court to that effect.

§ 450. **Premiums Due Foreign Insurance Companies Subject to Local Taxation.**—Premiums due a foreign insurance company on open account, though charged to the company's local agent instead of to the policy holders,[1] or where a credit of thirty and sixty days has been extended, even though such extension is not evidenced by a written statement,[2] are also subject to State jurisdiction for taxation.

§ 451. **Credits Must be Localized in Jurisdiction for Taxation.**—The principle, therefore, established in the construction of State statutes, taxing all property within the scope of their operation, is that the State can tax whatever personal property it can *localize* within its jurisdiction. In the language of the Supreme Court of Pennsylvania:

"There is nothing poetical in tax laws. Wherever they find property they claim a contribution for its protection, without any special respect to the owner or his occupation."

Credits owing from citizens of the State to parties outside of it obviously cannot be localized in the State of the debtor, and for this reason they were not included in the tax law of Louisiana, as construed by its Supreme Court in New Orleans v. Stempel, *supra*, Sec. 446. It seems that, in order for the debt to be subject to the taxing power of the State, it must be reduced to a concrete form and evidenced in some tangible shape, as in a note or other written obligation, and must be actually in the State in the hands of an agent, or otherwise localized within its confines for permanent, as distinguished from temporary, use.[3]

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[1] Orient Ins. Co. v. Board of Assessors, 221 U. S. 357, 55 L. Ed. 769, (1911), affirming 124 La. 72.

[2] Liverpool Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, affirming 122 La. 98 (1911).

[3] As to the power of the State, where the creditor is domiciled therein, to tax credits and other personal property located in other States, see *infra*, Sec. 482 *et seq.*

§ 452. **Enforcement of Taxes Against Non-resident Owners of Property in State.**—Taxes are not debts, as they are not created by contracts, but are based upon the power of the State to enforce contribution from persons and property within its jurisdiction for the support of its government. The point was raised in the case of Bristol v. Washington County, *supra,* Sec. 447, that, as the domicil of the testatrix against whose estate the claim of the State for taxes was proven, and also the domicil of her executor, were in the State of New York, the power to tax could be exercised only against the very property taxed; that the assessments did not constitute judgments *in personam,* and that judgment on these assessments could not therefore be recovered against the ancillary administrator in Minnesota.

The Supreme Court, following the Supreme Court of Minnesota, decided that under the statute of that State for the purpose of proof and payment out of an estate in probate, a personal tax was a debt, though not a debt in the usual acceptation of the term, saying:

"The obligation to contribute to the support of government in return for the protection and advantages afforded by government is not dependent on contract, but on the exercise of the public will as demanded by the public welfare."

The claims were therefore properly allowed against the estate. The case of Dewey v. Des Moines,[1] was distinguished, as there the assessment was levied on real estate for a local improvement without service upon the non-resident or his voluntary appearance or any consent on his part to the jurisdiction.

But in a New York case it was held[2] that, while the State had the power to levy a tax upon the personal property of a non-resident, in this case national bank stock in a New York city bank, situated within its boundaries and subject to its jurisdiction, and for that purpose to separate the *situs* of the owner from the actual *situs* of the property within the State,

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[1] *Supra,* Sec. 397.

[2] City of New York v. McLean, 57 App. Div. 601 (1901).

and to subject it to taxation because it was within the State limits, yet it could only enforce payment of the tax by virtue of its jurisdiction over the property. It had not therefore by virtue of that jurisdiction any power to subject the non-resident owner of the property to a personal liability for the tax, although nothing appears to indicate that there was not personal service upon the defendant.[1] The court based its decision upon the doctrine of Pennoyer v. Neff,[2] and Dewey v. Des Moines.[3]

It will be observed that in the Bristol case, *supra,* the State of Minnesota overcame the difficulty of securing service of process in enforcing personal tax claims against a non-resident, through the ancillary administration in Minnesota of the estate of the deceased non-resident owner.

§ 453. **Credits Under the Louisiana Code Held Taxable.**— The Constitution of the State of Louisiana declares that all property shall be assessed in proportion to its value, and the statute defines "Credits" as those arising from business done in the State, as the business domicil of the non-resident owner, his agent or representative. The Supreme Court held[4] that a State was not forbidden by the Federal Constitution to tax credits arising out of loans on collateral securities made by the local agency of a foreign corporation, which retains the collateral, and as evidence of the indebtedness takes the customer's so-called check which is regarded as an overdraft, upon which

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[1] Justices Van Brunt and O'Brien dissented, saying: "The right to tax would not be of much value if there were no power to collect. The tax bears the same relation to a non-resident as to a resident, and as a tax is a debt due from a resident and is collectible by suit, it would seem to follow that a tax against a non-resident would be collectible in the same manner when the court can get jurisdiction of the non-resident by the service of process." It was also suggested that a lien could not be enforced against the stock, as the owner had the certificate and could give title to it by transfer through the proper power of attorney.

[2] 95 U. S. 714, 24 L. Ed. 565 (1878).

[3] *Supra,* Sec. 397.

[4] State Board of Assessors v. Comptoir National D'Escompte de Paris, 191 U. S. 388 (1903), 48 L. Ed. 232.

the customer is charged interest and which is finally sent to the home office, to which the money when repaid is remitted by an exchange transaction, unless reloaned by the local agent or other parties. The court said that considering the prior adjudications of such transactions, it would be taken as the settled law of the court, that there was no inhibition in the Federal Constitution against the right of a State to tax property in the shape of credits, when the same are evidenced by notes or obligations held within the State in the hands of an agent of the owner for the purpose of collection or renewal, with the view of new loans and carrying on such transactions as a permanent business.

§ 454. **Credits Held Not Localized for Taxation.** — The State cannot consistently with due process of law tax notes in the hands of an agent who had no interest therein, but to whom they were sent merely in an effort to escape taxation by an agent in another State. This was adjudged in a case where the loan was made in Ohio secured by lands there situated and there payable, and sent to an Indiana agent of the payee in order to escape taxation in Ohio, there to be held by him until they were needed in Ohio to have payments of interest endorsed thereon, or to be delivered up if the principal was paid.[1] The court said that this decision had no tendency to aid an owner of taxable property in an effort to avoid or to evade proper and legitimate taxation, and added:

"The presence of the notes in Indiana is no bar to the right if it otherwise existed, of taxing the funds evidenced by the notes in Ohio. It does, however, tend to prevent the taxation in one State of property in the shape of debts not existing there, and which, if so taxed, would make double taxation almost sure, which is certainly to be deprecated, and ought, wherever possible, to be prevented."

§ 455. **Bank Credits Under California Statute Held Not Taxable.**—The Constitution of California declared that all property in the State not exempt under the laws of the United

[1] Buck v. Beach, 206 U. S. 392, 51 L. Ed. 1106 (1907), reversing 164 Ind. 37, Justices Day and Brewer dissenting.

States should be taxed in proportion to value (Art. XIII, Sec. 1), and that the word "property" should include all moneys, credits, etc., capable of private ownership. The Code, 3617, declared that the word "Credits" should mean those solvent debts not secured by mortgage or trust deed owing to the person or corporation assessed. It was held by the Circuit Court of Appeals (9th Circuit),[1] that where foreign corporations maintained branch banks in San Francisco, Portland, Oregon and Tacoma, Washington, and credits were carried on the books of the other branches for their benefit and charged to them as a mere matter of book-keeping, without any promise or obligation on the part of the deputy agencies to return the money to the San Francisco bank, were not credits arising in the State of California, or taxable therein. The court said that the authority of every State to tax all property, real and personal, within its jurisdiction was unquestionable, but that the taxing power of the State in a case of this character was limited to property within the State.

§ 456. **Power of State in Taxing Corporation Bondholders Through Corporation.** — The practical difficulty of reaching individual personal property like choses in action, notes and mortgages, for taxation, has led to attempts to reach so much of said property as was represented by bonds of corporations. This was attempted by compelling all corporations, having offices in the State which issued bonds, to pay the tax on such bonds and deduct the amount from the interest on the bonds paid to the holder. But it was held by the Supreme Court that as to *non-resident* bondholders, such taxation was not a legitimate exer-

[1] London & San Francisco Bank v. Block, C. C. A., 9th Cir. (1905), 136 Fed. 138, reversing 117 Fed. 900. See also Spring Valley Water Co. v. City and County of San Francisco, 225 Fed. 728 (1915), where held that deposits made in banks pursuant to order of court by the water company suing to enjoin the enforcement of water rights were taxable under the same code. A deposit in the bank to the credit of the depositor subject to his check is a debt and not property of the bank, and its *situs* for the purpose of taxation is in the State of the depositor's domicil. Pyle v. Branneman, Circuit Court of Appeals, 4th Circuit, 122 Fed. 787 (1903).

cise of the taxing power of the State, but an attempt to reach property beyond its jurisdiction, and that the law sought to be enforced was an impairment of the obligation between the corporation and the bondholder.[1] The tax laws could have no extra-territorial operation.

In this case no reference was made to the Fourteenth Amendment. But later,[2] the Fourteenth Amendment was invoked in resisting a statute directing a deduction of the tax from the interest paid by the railroad company to the resident holders of bonds. But the Supreme Court ruled that as to such resident bondholders, this requirement was within the lawful power of the State.

§ 457. **State Cannot Compel Foreign Railroad Company to Act as Tax Collector.**—In another case the State of Pennsylvania endeavored to enforce this tax as to resident holders of the bonds of a New York railroad corporation having its office there, but operating part of its road in Pennsylvania, by compelling the corporation to deduct the tax from the interest paid at its New York office to the holders of its bonds who were residents of Pennsylvania.[3] The court said that, if there was any question as to the deduction of the tax from the interest paid to non-resident holders, that is, to bondholders not residents of Pennsylvania, the State tax on Foreign Held Bonds Case would be conclusive against the State. On the other hand, the court distinguished this case from the case last cited, that

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[1] State Tax on Foreign Held Bonds, 15 Wall. 300, *supra*, Sec. 439. Justices Davis, Miller and Hunt dissented, saying that in their opinion the State legislature was not restrained by anything in the Federal Constitution nor by any principle which that court could enforce against the State court, from taxing the property of persons which it could reach and lay its hands on, whether these persons resided within or without the State. See also Railroad Co. v. Jackson, 7 Wall. 262, 19 L. Ed. 88 (1869); Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760 (1878).

[2] Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892 (1900). See also Commonwealth v. Delaware Div. Canal Co., 123 Pa. St. 594, 2 L. R. A. 798 (1889).

[3] Erie Railroad Co. v. Pennsylvania, 153 U. S. 628, 38 L. Ed. 846 (1894).

of Bell's Gap Railroad v. Pennsylvania, because that was a Pennsylvania corporation which was compelled to deduct the tax from the interest paid to Pennsylvania holders of its bonds. Decision was rendered against the State on the ground that it had no right to make the New York railroad company its tax collector, that is, to impose upon the company the duty of collecting the State taxes at its office outside of the jurisdiction of the Commonwealth, and that it could not impose such a duty as a condition of permitting the New York railroad company to perform its business as a common carrier within the State of Pennsylvania.

It will be seen that these decisions are applicable only to *bonds* of a railroad company, which are treated as debts having their *situs,* for taxation, at the residence of their holders. The power of the State to make the *mortgage* securing the bonds an interest in the property mortgaged, and taxable as such, was not before the court. It will be observed also that these decisions have no application to the case of corporate *stock* and its liability to taxation by the State of incorporation, irrespective of the residence of the holders.

Public stock, which is the form in which the indebtedness of States and municipalities is sometimes evidenced, when held by parties not domiciled in the State, is not subject to the taxing power of the State. Thus a resident of New York was held not taxable in Maryland on the stock of the city of Baltimore, the court saying that the taxable *situs* of the stock was at the domicil of the owner.[1]

§ 458. **State May Make Mortgage Taxable Interest in Real Estate.**—In the Tax on Foreign Held Bonds Case, *supra,* Sec. 439, the opinion was expressed that a mortgage, being a mere

[1] Mayor v. Hussey, 67 Md. 112 (1887), the court following the Tax on Foreign Held Bonds case, *supra,* and Murray v. Charleston, 96 U. S. 432, *supra* 456. In this case the tax had been deducted from the interest. The court held that although there was no authority for this action, the owner was estopped by her acquiescence for several years, so that it was in effect a voluntary payment, barring her from recovering it back.

security for a debt, confers upon its holders no interest in the land, and when held by a non-resident is as much beyond the jurisdiction of the State, as the person of the owner. This declaration was urged against the system, adopted by the State of Oregon, of taxing mortgages as interests in the real estate. According to this system, the mortgage was made a separate interest in the real estate for taxation, and was taxed to the mortgagee, while the equity, or the value of the property less the mortgage, was taxed as the interest of the mortgagor. A California corporation owning notes secured by mortgage upon real estate in Oregon filed a bill against the enforcement of a tax, levied, under this statute, on their mortgage-interest on the ground that the tax was, in violation of the Fourteenth Amendment, a taking of property without due process of law. The court, in an opinion by Justice Gray,[1] held that the tax was valid, and, after analyzing the statute and showing that the personal obligation of the mortgagor was not taxed, and that the mortgagor as well as the mortgagee was entitled to have deducted from his own assessment the amount of his indebtedness within the State, said, p. 425:

"The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation.[2] Nor is any such discrimination made between mortgagors and mortgagees, or between resident and non-resident mortgagees, as to deny to the latter the equal protection of the laws. . . .

"The authority of every State to tax all property, real and personal, within its jurisdiction, is unquestionable. 4 Wheaton 316, 429. . . . The State may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full

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1 Savings Society v. Multnomah County, 169 U. S. 421, 42 L. Ed. 803 (1898), affirming 60 Fed. 31, Justices Harlan and White dissenting.

2 The statement in the opinion that there is "no double taxation" in this taxation of mortgages as real estate obviously applied only to the State of Oregon. There was nothing to prevent the State, where the holder of the mortgage is domiciled, from taxing him upon the mortgage as part of his personal estate. See Kirtland v. Hotchkiss, *infra*, Sec. 483.

value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purpose of taxation, either treat the mortgage debt as personal property, to be taxed, like other choses in action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its *situs.*"

§ 459. **Foreign Held Bonds Case in Part Overruled.**—As to the Foreign Held Bonds Case,[1] after stating what was decided, the court said:

"The remarks in the opinion, supported by quotations from opinions of the Supreme Court of Pennsylvania, that a mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and when held by a non-resident is as much beyond the jurisdiction of the State as the person of the owner, went beyond what was required for the decision of the case, and cannot be reconciled with other decisions of this court and of the Supreme Court of Pennsylvania."

After citing opinions of that court and of the State courts as to the interest of a mortgagee, the court declared that the case of Kirtland v. Hotchkiss, *infra,* Sec. 483, decided only that debts to persons residing in one State, secured by mortgage of land in another State, might for the purpose of taxation be regarded as situated at the domicil of the creditor, but that the question whether the mortgage could be taxed there only was not involved in the case. The opinion concludes:

"The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle and in ac-

[1] 15 Wall. 300, *supra.*

cordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or non-resident) in the State where the land is situated, without contravening any provision of the Constitution of the United States.''[1]

§ 460. **State May Tax Stock of Non-resident Holders in Domestic Corporations.**—Under the same principle of the right to tax all property which can be localized in the jurisdiction, a State may tax the capital stock of its domestic corporations, either directly to the corporation, or through the corporation to the individual shareholders, irrespective of their residence, whether in or out of the State, the stock having a *situs* for taxation at the domicil of the corporation.[2] This is the principle adopted in the taxation of non-resident shareholders in national banks, taxed by the States under the authority of the Act of Congress,[3] the stock of the non-resident holders having a *situs* for taxation at the domicil of the bank.

A statute of Connecticut allowing to resident stockholders a deduction from the assessment of their stock at its market value on account of the value of the real estate held by the corporation, although no such deduction was allowed the non-resident

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[1] In Mackay v. San Francisco, 113 Cal. 392, this system was sustained; see also Dundee Mortgage Co. v. School District No. 1, 19 Fed. 359 (1884), and 21 Fed. 151 (1884).

In Allen v. National State Bank, 92 Md. 509 and 52 L. R. A. 760 (1901), a statute taxing mortgages as real estate was sustained, although no provision was made for deducting the amount of the mortgage debt from any assessment upon the mortgagor, as in the Oregon statute. The court said (p. 515) that this omission was "rather an objection to its justice and fairness than to its validity."

In the Southern Pacific Railroad cases, 13 Fed. 722 (1882), and 18 Fed. 385 (1883), the California system was held by Justices Field and Sawyer to be violative of the Fourteenth Amendment, for discrimination in exception of railroad mortgages. For decision of Supreme Court of Missouri holding constitutional amendment in that State introducing the California system void for same reason, see *supra*, Sec. 336.

[2] Street R. R. v. Morrow, 87 Tenn. 406 (1889); St. Albans v. National Car Co., 57 Vt. 68 (1884).

[3] Tappan v. Merchants' Bank, 19 Wall. 490, 22 L. Ed. 189 (1874); "Taxation of National Banks," *supra*, Chap. IX.

shareholders, was sustained by the Supreme Court, affirming the judgment of the Supreme Court of Connecticut.[1] The tax was objected to on the ground that there was a discrimination between the resident and non-resident stockholders, working a denial of the equal protection of the laws; but the court said that the discrimination was only apparent, as the non-resident stockholder paid no local taxes, but simply contributed so much to the expenses of the State, while the resident stockholders paid no tax to the State but only to the municipality in which they resided.

The State of the residence of the stockholder may tax the same stock as part of his personal property, see Sec. 484, *infra.*

§ 461. **Non-resident Stockholder Not Taxable in Absence of Statute.**—But while a State has this power to tax non-resident stockholders in domestic corporations, the existence of such power is not inferred, in the absence of statute specifically subjecting such stocks to taxation, particularly when it would involve double taxation, and is inconsistent with the general tax system of the State. This was held in the United States Circuit Court in California[2] in a suit brought against Mr. Mackay after he had removed his domicil from the State, to recover taxes, with interest and penalties aggregating nearly $500,000, assessed against him on account of shares in a number of corporations organized for various purposes. These corporations were organized under the laws of California, and they had their offices in that State, but all or nearly all of their property was in the State of Nevada. The court said that under the laws of California, as construed by the Supreme Court of that State, the taxation of corporate property to the corporation and the shares to the shareholders was double taxation, which was prohibited by the State constitution. This case again came up before the United States Circuit Court, which held that the *situs* of money and solvent credits for the purposes of taxation, in

[1] Travelers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. Ed. 949 (1902), affirming 73 Conn. 255.

[2] San Francisco v. Mackay, 21 Fed. 539 (1884).

the absence of statute, is the residence of the owner, and defendant was admitted to be a non-resident of California.[1] As to the public policy which condemned discrimination against foreign stockholders in domestic corporations, the court said:

"The obvious tendency of discrimination,—double, unequal, and unjust taxation,—is to drive our citizens having a large amount of personal property out of the State to escape that kind of oppression. If, notwithstanding their departure, they can still be taxed upon their incorporeal and intangible property through their stock in domestic corporations, and thereby be taxed on the same property in both States, the next step will be for business men either to withdraw their investments from the State, or change them from domestic into foreign corporations, as has sometimes been done, and the business will hereafter, to a large extent, be carried on by non-residents in their individual characters, or by foreign corporations over which the State has little control, and the State will be confined for its revenue to the tangible property of such non-residents and foreign corporations found within its borders. A policy that recognizes the principle stated, for the purpose of taxing the stock of resident citizens in foreign corporations, as following the person, but repudiates it for the purpose of taxing the stock of citizens and residents of other States in domestic corporations, thereby imposing upon them the burdens of taxation upon the same property in both States, cannot fail to be inimical to the best interests of the State, and to discourage investments by both resident and non-resident capitalists, thereby greatly retarding the future development of its resources. It also places foreign on a better footing than domestic corporations, in violation of the constitution. The principle should be altogether repudiated, or made applicable both ways. I cannot impute to the legislature an intention to adopt a policy so suicidal as that claimed by the complainant, without provisions of the constitution and statutes, indicating such a purpose, far more specific and unmistakable in their import than any yet brought to my attention."

§ 462. **Due Process of Law in Taxation of Interstate Properties.**—The subject of the taxation of interstate carriers has been considered, Chapter VIII, in connection with the regula-

[1] San Francisco v. Mackay, 22 Fed. 602 (1884). See also State v. Thomas, 26 N. J. L. 181 (1857), and Sec. 489, *infra*, note 1.

tion of commerce. It was strongly urged in cases there referred to that the rule of assessment enforced by the States of Ohio and Kentucky under the so-called unit rule and mileage apportionment was in effect a taxing of property beyond the jurisdiction of the State, and so a denial of due process of law.[1] It was adjudged in those cases, though against a vigorous dissent, that the valuation of the property as a unit profit-producing plant did not violate any Federal restriction or tax any property beyond the jurisdiction of the State, as the attempt was only to place a just value upon that part of the property which was within the State's confines. It was said, however, that the company had the right to show that it had property in other States, which was included in the total value and which did not properly fall under the taxing power of the State; and the court said that if such facts exist they should be taken into consideration by the State in its proceedings. But if the company does not make such disclosure, it cannot complain if the State treats all of its property as taxable, that is, on the basis of mileage apportionment. The court added in overruling the motion for rehearing in the Ohio case:

"It is said that the views thus expressed open the door to possibilities of gross injustice to these corporations, through conflicting action of the different States in matters of taxation. That may be so and the courts may be called upon to relieve against such abuses."

The principle is therefore established that while a State can only tax that part of the property and franchises of a railroad, steamboat, telegraph or other interstate corporation which is located within its limits, it can in determining the value of that part consider the value of the entire property in all the States where located as a profit-producing unit. It cannot, however, determine arbitrarily that the ratio of the mileage in the State to the total mileage is that part of the total value represented by the property within the State. It must consider all the facts which are offered, which tend to show what part of the aggre-

[1] Adams Express Co. v. Ohio, *supra*, Sec. 272; Adams Express Co. v. Kentucky, *supra*, Sec. 276.

gate value is actually within that jurisdiction. The so-called unit and mileage rules therefore when applied to the valuation of interstate properties, are merely admissible rules to assist in the determination of the value of the property actually employed in the State (see Ch. VIII, *supra*). It is clear that if the State should refuse to consider such facts, or if for any reason, either in the statute as construed by the State court, or in the enforcement of it by the State officials, it should appear that the value of the property outside of the State was included in the assessment, there would be a denial of due process of law. But, if the statute as construed by the State court provides for a consideration of all the facts, and an opportunity is afforded for hearing, an erroneous determination of the effect of the evidence upon the valuation of the property within the State would not present any Federal question. Indeed, in the absence of fraud or intentional wrong or error, there is grave doubt whether the conclusions of the assessing boards are subject to judicial review in the State court, where there is no statutory provision for review by *certiorari* or otherwise.[1]

[1] Thus it was held by the Supreme Court of Arkansas, in Wells, Fargo & Co. v. Crawford County, 63 Ark. 576, and 37 L. R. A. 371 (1897), in applying to the taxation of express companies in that State the unit rule and mileage apportionment, as sustained by the U. S. Supreme Court in the Ohio and Kentucky cases, that the statute directing the board to make the assessment by taking the same proportion of the aggregate value of the capital stock of such express company as the number of miles of railway in the State over which it carried on its business bore to the aggregate number of miles of railway within as well as without the State over which the company did business, was to be construed as restricting the board to this plan of assessing plaintiff's property only in the absence of other evidence. It was the duty of the board to consider all evidence which had come to their knowledge concerning the value of such property within and without the State. If, therefore, the part of the business outside of the State was done on waterways, this fact was to be considered. The court must presume that the legislature knew it could not tax property situated outside the limits of the State, and this would involve the presumption that there was no intention to tax such property. Mere error in the finding of the board as to the amount of the assessment was not ground

§ 463. **Due Process of Law in Taxation of Corporations.**— Corporations are persons within the meaning of the Fourteenth Amendment, and are therefore entitled to due process of law. Their property, whether they are domestic or foreign, can only be taxed like other property of the same class. There is a distinction, however, between the taxation of property of corporations and that of individuals, which has been already illustrated in the power of the State to tax the stock of non-resident holders in domestic corporations. The individual cannot be taxed in the State upon his real estate located in other jurisdictions, but the corporation can be taxed in the State of its incorporation upon the full value of its capital stock, irrespective of whether any part or all of that stock is invested in real estate or other property in other jurisdictions.[1]

This power of the State to tax the corporate capital stock or corporate property is distinct from its power to impose a franchise tax, at discretion, upon the privilege of acting in a corporate capacity within its jurisdiction. The latter power, as applied to foreign corporations, has already been considered.[2]

Some States, notably New York, have adopted the principle of taxing both domestic and foreign corporations upon that part of the corporate stock employed in the State.[3]

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for interference by the courts in the absence of fraud, intentional wrong or error in the method of assessment. The courts are powerless to give relief against the erroneous judgments of assessing bodies, except as they are specially empowered by law to do so.

[1] As to double taxation involved in this power of taxation, see Sec. 489 *et seq.*, *infra.*

[2] See *supra*, Ch. V, where it was shown that while the State cannot tax the property as such of foreign corporations located in other jurisdictions, it can impose a tax upon the privilege of doing business in the State, which may in effect be a tax upon the property in other jurisdictions.

[3] As to the construction of a statute taxing capital employed in the State, see People *ex rel.* v. Campbell, 138 N. Y. 543, and 20 L. R. A. 453 (1893). The relator in that case was a New York corporation holding stock in several other corporations, some domestic and some foreign, which it had received in compensation for grants of the right to use certain patents. It was held that so much of the capital of the relator

The reluctance of the judiciary to infer that the taxing power has been exercised unjustly in the case of foreign corporations, so that property outside the jurisdiction of the State has been taxed through the taxation of the privilege of doing business in the State, is illustrated by the opinion of the Supreme Court of Pennsylvania in a case already cited.[1] The court said that it doubted the power of the legislature to tax the entire property and assets, constituting the entire capital stock, of a foreign corporation whose interests compelled it to transact a portion of its business, however small, within the State. Great and far-reaching as is the taxing power of the State, it cannot tax either persons or property not within its jurisdiction.

"A foreign corporation has no domicil here, and can have none; hence, it cannot be said to draw to itself the constructive possession of its property located elsewhere."

There were a large number of foreign insurance companies doing business under State license in Pennsylvania, some of them having a very large capital. Under the theory of the Commonwealth, she could tax the entire property of such companies wherever it was located. The court said that certainly theretofore a sense of the injustice of this view, or perhaps that courtesy which springs from the comity between the States, had prevented the legislature from asserting a power of so doubtful a character, and that they would not impute such a purpose to it then, in the absence of clearly expressed intent.

§ 464. **Deposits by Foreign Insurance Companies Taxable by the State.**—It is customary to require non-resident foreign insurance companies doing business in the State to make a deposit of bonds or other securities with the Superintendent of Insurance for the protection of local policy holders. Such bonds

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as consisted of stock in the domestic companies, bonds of the foreign companies and patent rights still remaining undisposed of, was, for the purposes of taxation, capital "employed within the State;" but that stock in the foreign companies could not be properly included in that category.

[1] Commonwealth v. Standard Oil Co., 101 Pa. 119 (1882), *supra*, Sec. 178.

deposited in Ohio were properly listed for taxation under the laws of that State. While government bonds which had been lawfully substituted before the assessment day were exempt from taxation, other securities not exempt by law were subject to taxation; but this exemption of United States bonds from State taxation did not prevent their distraint under the Ohio law to satisfy taxes lawfully levied on the unexempt personal property of the company owning the bonds. The court said there was nothing in the exemption of government bonds from taxation which prevented them from being seized for taxes due upon any other unexempt property.[1]

A State has the constitutional power to provide by statute for the taxation of all personal property having an actual *situs* within the State, regardless of the domicil of the owner, while at the same time it taxes other property not actually within the State but whose owner resides therein.[2]

§ 465. **Jurisdiction in Taxation Over Property of Trustees, Receivers, Etc.**—The jurisdiction of the State also extends to property therein in the hands of trustees, receivers and others acting in a fiduciary capacity, irrespective of the residence of the parties beneficially interested in the property.[3]

A claim of non-residents to distributive shares of property

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[1] Scottish U. & M. Ins. Co. v. Bolland, 196 U. S. 611, 49 L. Ed. 619 (1905).

[2] West Assurance Co. of Toronto v. Halliday, C. C. A., 6th Circuit, 126 Fed. 257 (1903), affirming 110 Fed. 259; and Same v. Same, Circuit Ct. St. of Ohio, 127 Fed. 830 (1903).

[3] Baldwin v. State, 89 Md. 587 (1899); Stephens v. Railroad Co., 13 Blatchford, 104 (1875); Walters v. Railroad Co., 68 Fed. 1002 (1895); *Ex parte* Chamberlain, 55 Fed. 704 (1893). As to the taxation of trust property, see People v. Coleman, 119 N. Y. 137, and 7 L. R. A. 407 (1890). In Price v. Hunter, 34 Fed. 355 (1888), a tax was held properly levied upon certain mortgages held by a local trust company, because the trustee was domiciled in the State. As to procedure for collection of State taxes on property in possession of receivers appointed by Federal courts, see *infra*, Sec. 633. As to taxation of property in the hands of receivers, see Midland Guaranty & Trust Co. v. Douglass, 217 Fed. 358 (1914); Hamilton v. Beggs Co., 171 Fed. 157 (1909); Coy v. Title Guaranty Trust Co., 220 Fed. 90 (1915).

on final settlement did not prevent the taxation of funds in the hands of a receiver of a mutual benefit assessment society organized under the laws of the State[1] as property within its jurisdiction, although the funds had been collected in other States in which the company also did business, and turned over by orders of the courts of those States to the receiver, with the understanding that all holders of certificates in the different States should be ratably paid on final settlement.

Under the statute of Ohio, 1890, Sec. 2731, it was provided that all property within the State, and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in the State shall be subject to taxation, but where the trust estates and the beneficiaries are both outside of the State, and the trustees did not act as trustees in Ohio, the estate was not taxable there by reason of the fact that a trustee was a resident of that State.[2]

Property in the hands of a Trustee in Bankruptcy is not exempt from liability to State taxation by the Bankrupt Act of July 1, 1898, and is subject to such taxation in the Trustee's hands.[3]

§ 466. **The Taxable Situs of Stock Not Transferred by Pledge.**—It has been held that the transfer of stock in pledge to a trustee in another State for the securing of a debt did not operate to transfer the taxable situs to the State where the trustee was located.[4] The court said the transaction was in legal effect a mere pledge with a perfect right of redemption, although to render the pledge more effective the title and possession was in the pledgee and the taxable *situs* remained therefore in the State of the pledgor. It was argued in this case that

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1 Schmidt v. Failey, 148 Ind. 150, and 37 L. R. A. 442 (1897).

2 Goodsuter v. Lane, 139 Fed. 593, C. C. A. 6th Circuit (1905).

3 Schwartz v. Hammer, 194 U. S. 441, 48 L. Ed. 1060 (1904), affirming 110 Fed. 256. See also *In re* Crowell, 109 Fed. 659. As to priority of claim of taxation against an estate of a bankrupt corporation in New Jersey, see New Jersey v. Anderson, 203 U. S. 483, 51 L. Ed. 284 (1906), reversing 137 Fed. 858.

4 Central of Ga. Ry. Co. v. Wright, 166 Fed. 153 (1908).

the stock was of an Alabama corporation, and under the Alabama statute it was claimed that the *situs* of the stock was fixed by that statute for the purpose of taxation in Alabama. The court said, however, that such a statute providing for the taxation in that State of the shares of all domestic corporations wherever held had no effect upon the right of another State in which the shares of such a corporation were owned to tax the same.

§ 467. **Situs for Taxation of Deposits in Litigation.**—Where preliminary injunctions were issued on condition that the plaintiff, a public utility corporation, should deposit in banks of California the difference between the rates sought to be charged and those actually collected, to await the final outcome of the litigation, the court held that an assessment on these funds so deposited was not an assessment against the bank, but was one against funds in the hands of the bank acting as receiver.[1] Such an assessment was held not invalidated because of misdescription and comingling by taxing officers, as they related only to a matter of detail in the records of the court, and the assessment was of a fund in the possession of an officer of the court.

§ 468. **State's Jurisdiction Over Property for Taxing Purposes Summarized.**—The State can therefore tax all property, real and personal, which can be localized within its jurisdiction, including money, bank notes and evidences of debt, such as municipal securities, notes and mortgages, found in the State or in the possession of residents of the State, in the hands of the owners or their agents or bailees, whether the owner is domiciled in the State or not; also the capital stock of domestic corporations, irrespective of the residence of the stockholders and the locality of the property represented by such stock. It may tax the property located in its jurisdiction of all foreign corporations, including those doing business therein either under authority of Congress or through the comity of the State, regard-

[1] Spring Valley W. Co. v. San Francisco, 225 Fed. 728 (1915), C. C. A. 9th Circuit.

less of the fact that such corporations are taxable upon their capital representing such property by the State of their incorporation, and irrespective of the taxation in their own States of the non-resident stockholders of such corporations. The State may also, for the purposes of taxation, treat mortgages on realty located in the State as interests in the realty mortgaged, whether the owners of such realty reside in the State or not.

This comprehensive power of taxation over property found within its jurisdiction is within the broad domain of legislative power growing out of the sovereignty of the State; and, except as restrained by the Constitution of the United States, the State may select one or more of these subjects of taxation within its jurisdiction in its own discretion. It will be seen, however, that there is a distinction between property subject to the exercise of this taxing power, and property subjected to taxation by the lawful exercise of that power.[1]

§ 469. **Taxation of Business and License Taxation.**—The jurisdiction of the State extends not only to property located or employed within its territory, but also to all business carried on and occupations and professions practiced therein. The power to tax property employed in any business conducted in the State, whether by individuals, partnerships or corporations, has been already considered. But the power of the State is not confined to imposing a tax on such property. It can tax also the conduct of business itself in any of its infinite forms, that is, the right or privilege of engaging in and carrying on business, professions, manufactures, trades or transportation within its limits, whether by individuals, partnerships or corporations, residents or non-residents. This comprehensive power of taxation may be exercised by the State in its discretion, subject only to the restraints of its own constitution.

Such taxes are sometimes called by the generic name of "business" or "occupation" taxes. The term "license" may be contrasted with "tax," in that a license is required under the police power for regulation, its issue being a condition precedent to

[1] *Infra*, Sec. 496.

the right to carry on a business, while, if the fee charged for the license is greater than the expense involved in the issue and the necessary expense of regulation, its exaction constitutes an exercise of the power of taxation. In this sense therefore a license may exist without the imposition of a tax, and a tax may be imposed without the granting of a license. But as business, occupation or privilege taxes are usually collected through the issue of licenses, which are made conditions precedent of the right to carry on the business or occupation or to exercise the privilege, they are in effect licenses, and are commonly so termed.[1] It is in view of this distinction between a license in the stricter sense and a tax, that the power is conferred in municipal charters to "license, tax or regulate."

The power of the State to tax foreign corporations for the privilege of doing business in its jurisdiction, irrespective of its right to tax the capital employed therein, has been already considered.[2]

A partnership, whether composed of non-residents or not, if it has a local office or place of business, and so does business in the State, is clearly subject to its taxing power, not only as to the assets employed by it in the State in such business, but also as to the privilege of conducting the business therein. Where the business of the partnership is thus localized in the State, and it enjoys the protection of the State's laws, it is obviously immaterial to the taxing jurisdiction of the State where the owners of the business are domiciled. The tax may be upon the assets employed in the business or upon the privilege of conducting the business in the State.[3]

The right to tax in such cases rests not upon the domicil of the partnership or person, as in ordinary personal property taxation, hereafter considered, but upon the fact that property is invested and business transacted in the State.

§ 470. **Membership in an Incorporated Chamber of Commerce Taxable.**—An interesting illustration of the taxing

[1] See License Tax Cases, 5 Wall. 462, 18 L. Ed. 497 (1867).

[2] See *supra*, Ch. V.

[3] Hopkins v. Baker Bros. & Co., 78 Md. 363, 22 L. R. A. 477 (1893).

power of the State over business located in the State is afforded in the ruling of the Supreme Court that memberships in an incorporated Chamber of Commerce, which has no capital stock and transacts no business for a pecuniary profit, but merely furnishes a building and equipment for its members, who under its rules transact business upon the trading floor, that is, a grain exchange, are property and taxable as such, and are properly assessed for taxation under the general heading in the State Statute of "moneys and credits."[1]

It was held in this case that the State could fix the *situs* for taxation of memberships in such a Chamber of Commerce at the place in the State at which the Exchange is located, whether such memberships be held by residents or non-residents.

§ 471. **License Tax on Emigrant Agent Sustained.**—The comprehensive power of the State to tax employments is illustrated by the decision of the Supreme Court, sustaining a license tax imposed by the State of Georgia upon each emigrant or employer or employe of such agent doing business in that jurisdiction.[2] It was urged that this was violative of the Fourteenth Amendment and impaired the right of free egress from the State. The court held, however, that it was a valid tax upon the occupation, that its purpose, connected as it was with the licenses upon other occupations, was altogether to gain revenue, and that no intention to prohibit the particular business could be imputed. The licenses only affected incidentally

[1] Rogers v. County of Hennepin, 240 U. S. 184, 60 L. Ed. 594 (1916), affirming 124 Minn. 539.

It was subsequently held by the Supreme Court of Minnesota, in State *ex rel.* Goetzman v. Lord, 161 N. W. 516 (1917), that such memberships, under a system of classification in force in that State, were properly classed as "personal property" having a local *situs*, though owned without the State, and the assessable value was found by apportioning the value of the membership in excess of the value of the tangible property which was already assessed equally among the membership and taxing forty per cent thereof, under the State classified taxation system. See Minnesota Tax System, *infra*, Appendix.

[2] Williams v. Fears, 179 U. S. 270, 45 L. Ed. 186 (1901), affirming 35 S. E. (Ga.) 699.

and remotely the volume of travel from the State or the freedom of contract.[1]

§ 472. **Taxation and Regulation Under Police Power.**—The power of taxation in the licensing of employments is closely allied to the police power of regulation. A license may be imposed for the purpose of regulating an employment as a police measure for the public safety and also as a means of revenue. Thus the liquor traffic may be prohibited altogether by a State, or permitted under such regulations by way of licenses as the legislative power deems proper.[2] As the legislature has the power to prohibit absolutely the sale of intoxicating liquors, it follows that it may impose any conditions or restraints upon the traffic which fall short of absolute prohibition, and these conditions and restraints may take the form of a license fee exacted as compensation to the public.[3]

There is no necessary connection between a license to engage in a business and a tax upon the right to engage in a business. The former confers a privilege, the latter is levied upon the exercise of a privilege. But both taxation and regulation may be effected in the form of a license by the same statute. This right to tax and regulate occupations for purposes of revenue and under the police power may be delegated by the State to municipalities, and

[1] In Fraser v. McConway, 82 Fed. 257 (1907), a tax levied by the State of Pennsylvania upon employers of foreign, unnaturalized males, authorizing a deduction of the amount of the tax from the wages of the employes, was held invalid as violative of the Fourteenth Amendment. In Joseph v. Randolph, 71 Ala. 499 (1882), a license tax of $250 exacted by the State of Alabama from all emigrant agents, who should contract in certain designated counties with laborers to remove them from the State, was held void as an indirect tax upon the citizen's right of free egress, operating to hinder his personal liberty, and therefore contrary to both the State and Federal constitutions. The court said that it was not a tax upon the right of hiring laborers, but its purpose was to prevent a free egress of laborers from the counties designated in the act.

[2] Bartemeyer v. Iowa, 18 Wall. 129, 21 L. Ed. 929 (1874); Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989 (1879); Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205 (1898).

[3] State v. Bixman, 162 Mo. 1 (1901).

the latter can then exercise such power without violation of due process of law.

A municipal ordinance granting the right of an incorporated telephone company to place and maintain upon the streets poles and wires, is not a mere license, but is a grant of a property right which is an incident to property, in that it is assignable and subject to taxation.[1]

§ 473. **Special Excise Taxes in the Exercise of the Police Power Sustained.**—It was said by the Supreme Court, in sustaining the ordinance of the City of Chicago prohibiting the sale of cigarettes except under a license of $100.00,[2] that it was not a valid objection to the ordinance, that it partook both the character of a regulation and also that of an excise or privilege tax; that it was for the State to determine what such regulation should be and as to what particular trade, business or occupation they should apply; and, unless they are utterly extravagant in their nature and purpose, they do not extend beyond the power of the State. Whether there was or was not an unlawful delegation of power by the council to the mayor was not a Federal question.

Under the same principle the court has sustained special excise taxes for regulation under the police power of industries and occupations. Thus it sustained an Oklahoma statute[3] which levied upon every bank existing under the laws of the State an assessment of the percentage of the bank's average deposits for the purpose of creating a guaranty fund which made good the losses of the depositors of insolvent banks. The fund was thus created, not by general taxation, but by a special imposition in the nature of an occupation tax on all banks existing under the laws of the State. Thus, license taxes upon motor vehicles graduated according to horse power, have been sustained so as to secure compensation for the use of improved roadways from a

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[1] Owensboro v. T. & T. Co., 230 U. S. 58, 57 L. Ed. 1389 (1913).

[2] Gundling v. Chicago, 177 U. S. 183; 44 L. Ed. 725 (1900).

[3] Nobel State Bank v. Haskell, 219 U. S. 104; 55 L. Ed. 112 (1911)

class of users for whose needs they are essential, and whose operations over them are peculiarly injurious.

The same principle has been applied by the Supreme Court in sustaining what are known as the "Workmen's Compensation Laws," where employers in certain industries, without regard to any wrongful act on their part, are compelled to make periodical contribution based upon the percentages of their payrolls, to a State fund from which compensation shall be made for injuries received by employes in the course of their employment in such industry.[2]

The court said that such an exaction was the valid exercise of the State police power, there being no claim that the scale of compensation was unduly large, and the schedule of contribution evidencing an intent to proportion the various percentages according to the hazards of each of the groups into which the industries are divided, and to limit the burden of the requirement of each industry, and that class legislation which, in carrying out the public purpose, is limited in its application within the sphere of its operation and affects alike all persons similarly situated, is not condemned by the Fourteenth Amendment.

The principle thus declared, it is obvious, may have a wide application to legislation for the promotion of social betterment, where the taxing power is used by the State in connection with the exercise of the police power for the health, safety and general welfare of the people.[3] When the classification involved in such taxation is reasonable and the provisions of the act are not arbitrary or oppressive, the exercise of the taxing power is not violative of due process of law.

§ 474. **Limitations of Power to Impose Taxes on Occupations.**—But this power of the State to impose license taxes

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[1] Hendrick v. Maryland, 235 U. S. 612, 59 L. Ed. 385 (1913).

[2] Kane v. N. J., 242 U. S. 160, 61 L. Ed. p. 222 (1917).

[3] Mountain Timber Co. v. State of Washington, — U. S. —, 61 L. Ed. — (March, 1917), affirming 75 Wash. 581, sustaining the constitutionality of the Workmen's Compensation Act of the State of Washington.

upon occupations must be exercised subject to the prohibitions already considered against interference with interstate or foreign commerce. The State cannot tax the business of conducting interstate commerce as such, nor the soliciting of orders through sales by samples or otherwise, nor can it discriminate through business or occupation taxes against the manufacturers of other States.[1]

Although the State may license occupations, it is not relieved from the restraints of the Federal Constitution in the taxation of the property employed in such occupations. This, like any other property, is entitled to due process of law and the equal protection of the laws in taxation as in any other exercise of State powers.

§ 475. **Jurisdiction Over Persons for Taxation.**—While the State, in the exercise of the power of taxation, may disregard the fiction that personal property has its *situs* at the residence of the owner, and may tax all property which it can find located within its jurisdiction, it may also through its power over persons within its jurisdiction, subject credits and other personal property owned by them to taxation, though such property may be located in another State, and, in the case of credits, owed by debtors residing in other States and secured by property situated there.

But the taxing power of the State over persons obviously depends upon the domicil of the person, as domicil is the test of liability for purely personal taxes.[2] Domicil, or habitation, in the quaint language of the Massachusetts constitution, is "where a man dwelleth and hath his home."

Justice Story says:[3] "By the term 'domicil,' in its ordinary acceptation, is meant the place where a person lives or has his home. In this sense the place where a person has his actual residence, inhabitancy, or commorancy, is sometimes called his domicil. In a strict and legal sense that is properly the domicil of a person where he has his true, fixed, permanent home and

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[1] *Supra*, Chs. III to VI.

[2] Dicey on Conflict of Laws, Am. Ed. 171.

[3] Conflict of Laws, 7th Ed., Sec. 41.

principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*)." Fact and intent therefore must concur to constitute a domicil.

It was said by the Supreme Court of Massachusetts, by Chief Justice Shaw:[1] "No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim, that every man must have a domicil somewhere; and also that he can have but one. Of course it follows, that his existing domicil continues until he acquires another; and *vice versa*, by acquiring a new domicil, he relinquishes his former one."

It follows therefore that the term "resident" or "inhabitant" in State taxing laws must be construed as meaning one who has his domicil in the State. A man may have several residences, but he can have only one domicil. Where it is located, he may be taxed upon his personal property and his credits, wherever that property or the property securing such credits may be located. But obviously this tax dependent for its validity on jurisdiction over the domicil, can be imposed in but one place, as the taxpayer can have but one domicil, although, as we have seen, the State having jurisdiction over the property, also may tax it. The Supreme Court of Massachusetts said in construing the word "habitancy" as meaning domicil:[2]

"We think, however, that the sounder and wiser rule is to make taxation dependent upon domicil. Perhaps the most im-

[1] Thorndike v. City of Boston, 1 Metcalf 242, 245 (1840).

[2] Borland v. Boston, 132 Mass. 89 (1882). In this case Borland left Boston with his family in 1876 for Europe, to remain there an indefinite time, with intent to make some other place his home on his return, and while in Europe, before May 1st, 1877, had selected another city in another State as his future home, but remained abroad, without actually going to his new home, until 1879. It was held that his domicil in Boston for taxation still continued on May 1, 1877, no new domicil having been acquired. This principle has been followed in other cases. See Kellogg v. Winnebago County, 42 Wis. 97 (1877); Church v. Rowell, 49 Me. 367 (1861).

portant reason for the rule is that it makes the standard certain. Another reason is that it is according to the views and traditions of the people."

Thus in New Jersey a poll tax levied upon "inhabitants" was declared to be properly levied only upon those who were domiciled in the State, as the term "inhabitants" implied more than mere residents.[1]

§ 476. **Domicil Distinguished from Residence and Citizenship.**—The domicil, which is the basis of personal taxation, that is, taxation through the person, is to be distinguished from *citizenship* on the one hand and *residence* on the other. A resident alien, who never by naturalization, assumes the obligations of citizenship or disavows his allegiance to his native country, may acquire a domicil, and so subject his person to the taxing power of the State. He cannot be compelled to perform otherwise the duties of citizenship, but he can be compelled to contribute to the support of the State under whose protection he lives, earns his livelihood and enjoys his property.

On the other hand, the domicil is distinguished from residence. One may be taxed at his domicil, though at the time it is levied he is actually residing in another State or a foreign country. A person, who in contemplation of law has a domicil, may, nevertheless, as a matter of fact, be a mere wanderer and not an inhabitant or resident of any place.[2] In the legal sense every one must have a domicil, which, once fixed, continues until a new one is acquired, *facto et nomine*.[3]

§ 477. **Right to Change Domicil.**—It is a fundamental rule that the domicil of an independent person is dependent upon choice, that is, it is that place which he in fact and in intent makes his domicil. The right to make a domicil different from that originally acquired involves the right to make other changes, and the removal may, of course, be made from one place to another in the same State, or to another State or coun-

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[1] State v. Ross, 23 N. J. L. (3 Zab.) 517 (1852).

[2] Holmes v. Oregon & Cal. Ry. Co., 5 Fed. 523 (1881).

[3] Story on Conflict of Laws, 7th Ed., Sec. 44.

try. Whether, in fact, one claiming to have effected a change, has done so is a question of evidence, and the burden of proof is upon him.[1]

§ 478. **Motive in Change of Domicil Immaterial.**—It is also clearly immaterial what was the motive of the party in making the change, if it has actually been made. Thus a man may change his domicil from his city residence to one in the country or suburbs, in order to escape the burden of what he deems oppressive personal taxation. This he has a right to do. Thus it was said by the Supreme Court of Massachusetts:[2]

"It is well settled that a man may change his habitancy or domicil from one town to another, merely because he wishes to diminish the amount of his taxes. If he really intends to change his residence, and does change it, the motive which prompts him to do so is not material."

The same principle obviously applies as that announced by the Supreme Court in cases where it was claimed that a man had changed his residence for the purpose of affecting the jurisdiction of the Federal Court. The sole question is whether the change was made in good faith, that is, was actually made.[3]

§ 479. **Term Residence Employed in Sense of Domicil.**—The principle controlling the determination of the question of change of domicil was illustrated in a case in the United States Circuit Court of Minnesota.[4] Suit was brought to recover back personal property taxes paid under protest, on the ground that the plaintiff had already changed his residence, that is, his domicil, when the taxes were levied. The plaintiff, an unmarried man, had been engaged in business in a city of Minnesota, and being out of health, determined to wind up his affairs and move to New York where he intended to make his permanent

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[1] Mitchell v. United States, 21 Wallace 350, 22 L. Ed. 584 (1875); Desmare v. United States, 93 U. S. 605, 23 L. Ed. 959 (1877). See also Dicey on Conflict of Laws, Am. Ed., p. 131. The rule stated is of course qualified in cases of persons under disabilities and those having official residences.

[2] Draper v. Hatfield, 124 Mass. 53 (1878).

[3] Railway Company v. Ohle, 117 U. S. 123, 29 L. Ed. 37 (1886).

[4] McCutchen v. Rice County, 7 Fed. 558 (1881).

home. He left Minnesota in April, 1876, and on the day of the annual assessment, May 1st, he was *in itinere* at Philadelphia. The court held that on the latter date he was still a resident of Minnesota, as he had not, in fact, acquired a new residence, and he was therefore properly taxed as the owner of the personalty. The word "resident" in this case is clearly used in the sense of one domiciled; as the plaintiff, under the facts, had obviously changed his residence, but had not yet changed his domicil.[1]

§ 480. **Due Process of Law and Taxation at Domicil.**—Due process of law limits that personal taxation, which rests solely upon the State's jurisdiction over the person, to the place where that person is domiciled. No one, whether citizen or alien, can be taxed through the State's jurisdiction over his person except at the place of his domicil.

If a man has more than one residence, as not infrequently happens, a country and a city residence, for example, located in the same or different States, one of these, and only one, is his domicil, and which one is his domicil must be determined from all the facts. As a rule it is that place which he himself selects. No Federal question is involved in the decision, in good faith, of this question as to which of two residences is a man's domicil, or whether he has changed his domicil. But on the other hand, if the State asserts the right to tax by virtue of residence, irrespective of domicil, the jurisdictional question would be raised; provided, of course, there is no basis for the tax by reason of the presence of the property within the jurisdiction.

Thus in a New Jersey case already cited[2] a person domiciled in Georgia, but having a summer residence in New Jersey, which he occupied with his family for several months in the year, was held not subject in New Jersey to a poll tax levied upon the "inhabitants" of the State, nor was he taxable there upon his bonds or other securities. He was taxable, however,

[1] That the term "resident" in the taxing laws is used as the equivalent of "one domiciled," see Eidman v. Martinez, 184 U. S. 578, 46 L. Ed. 697 (1902), where the court distinguishes between the law of the *situs* and the law of the domicil.

[2] See Sec. 475, *supra*.

upon his real estate and his chattels, permanently used or kept in New Jersey, under a statute providing that all lands and personal effects in the State must be taxed. The court said that it was perfectly immaterial for purposes of taxation, that is upon property localized in the jurisdiction, whether he made his temporary residence in his own dwelling with his domestics and retinue about him, or as a mere lodger in the house of another.[1]

§ 481. **John D. Rockefeller Not Domiciled in Ohio for Taxation.**—Under the statutes of Ohio describing what should constitute a domicil for the purposes of taxation, it was held that John D. Rockefeller was not domiciled in Cleveland, Ohio, but in New York city, and as under the laws of Ohio securities owned by a non-resident could not be taxed, unless held within the State by a trustee or agent for him, the tax on $311,000,000.00 securities alleged to be owned by Mr. Rockefeller was declared invalid and its collection enjoined.[2]

The court held that it was incumbent on the State to prove the domicil within the State, and if there was any doubt in the meaning of the statute, the doubt must be resolved in favor of the citizen.

§ 482. **Taxation of Personal Property Situated Without the State of Owner's Domicil.**—The taxation of personal property according to its actual *situs* is so clearly established in the different States, that practically no attempt is made to assert the right to tax tangible personal property, such as merchandise,

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[1] A soldier stationed at Ft. Stark and maintaining apartments in Portsmouth was held not to be subject to a poll tax under the laws of New Hampshire, Ch. 82, Sec. 1, *Ex parte* White, 228 Fed. 88 (1915).

[2] Rockefeller v. O'Brien, 224 Fed. 541 (1915). The court held that the tax on two automobiles of Mr. Rockefeller in Ohio were taxable as tangible personal property under the laws of the State. Affirmed by C. C. A. 6th Circuit, 239 Fed. 127 (1917). The latter court said that the statute was aimed against citizens of Ohio, who, while really domiciled there, pretend to be domiciled outside the State, and the fact that Mr. Rockefeller was formerly a citizen of Ohio, before he removed to New York, could not in principle differentiate his situation from what it would be had he always been a non-resident. The Supreme Court denied an application for *certiorari* in this case.

live stock, furniture, etc., at the domicil of the owner, when the property is not located within the State. The State statutes providing for the taxation of property "within the State" have been construed as meaning property actually situated therein. Thus it was held in New York that an assessment of a citizen or one domiciled in that State, upon capital invested in business in New Orleans, and farm stock and household furniture in New Jersey, was erroneous under a statute which provided that "all lands and all personal estate within this State . . . shall be liable to taxation."[1] The court based its opinion upon the language and purpose of the statute, and intimated that the legislature could have taxed the property, but had not done so. In other words, the question was one of construction, and not of power.

The Supreme Court of Missouri, construing the law of that State, in an opinion notable for its recognition of the principle of interstate comity in taxation, commented upon the injustice of taxing property in the State of the owner's domicil, which is properly taxable elsewhere; and suggested that the rule of taxing at the actual *situs* could not operate unjustly to Missouri, as the property of foreign capitalists in the State more than equaled the property belonging to persons domiciled within its jurisdiction located outside of the State.[2] The court held that municipal bonds of a citizen of Missouri deposited with a safe deposit company in New York, were not taxable in Missouri.

It was held in the United States Circuit Court for Massachusetts,[3] by Justice Gray, that under the statutes of Massachu-

[1] People *ex rel*, Hoyt v. Commissioners of Taxes, 23 N. Y. 224 (1861).

[2] State *ex rel.* v. County Court, 69 Mo. 454 (1879), followed in Valle v. Ziegler, 84 Mo. 214. That the opinion of legislators, in the matter of interstate comity in taxation, does not keep pace with judicial opinion, is illustrated by the fact that the General Assembly of Missouri, after this decision, passed an act, Session Acts of 1881, p. 177, specifically subjecting to taxation in the State personalty situated in other States, so that all notes, bonds or other evidences of debt held in any State or Territory other than that in which the owner resides were made taxable. As to law of taxation of securities in Missouri (1917), see Appendix.

[3] Dallinger v. Rapello, 14 Fed. 32 (1882), see also 15 Fed. 434 (1883).

setts the property of a deceased inhabitant of that State, after the appointment of an executor and before distribution, was not taxable in the State, where the property was not in the State and neither the executor nor any person having an interest in the property was domiciled therein. The court expressed a doubt whether it was within the constitutional power of the State to impose such a tax.

A State, however, has no power to levy a tax upon the bonds and rolling stock of an interstate railroad permanently located in another State and employed there in the prosecution of its business. This was adjudged by the Supreme Court, which held that due process of law was denied a Kentucky corporation by the enforcement of such a tax.[1]

Nor could personal property owned by a non-resident express company and situated outside of the State be taken into account in fixing the value of property for taxation within the State on the mileage basis, on the theory that it gave a credit necessary for carrying on the business in the State, where the resulting assessment is greatly in excess of the value of the total good will of the company, measured by the business done or the relation of the total assets to the total value of its stock.[2]

It seems definitely established, therefore, certainly as to interstate railroads and wherever interstate commerce is involved, that tangible personal property outside of the State is not subject to the taxing power of the State.

As the State cannot tax tangible property permanently outside of the State, and having no *situs* within the State, it cannot attain the same end by taxing the enhanced value of the capital stock of the corporation which arises from the value of the property beyond the jurisdiction of the State. This principle was applied to the inclusion in the appraisement of the

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[1] Union Refrigerator & Transit Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 850 (1905), reversing 26 Ky. L. Rep. 25.

[2] Fargo v. Hirt, 193 U. S. 491, 48 L. Ed. 761 (1904). See also Detroit G. H. & M. R. Co. v. Fuller, 205 Fed. 86 (1913), holding void an attempt to impose a tax on the securities owned and held beyond its territorial jurisdiction.

capital stock of a corporation for the purpose of taxation the value of coal mined by it within the State but situated in other States there awaiting sale, when the appraisement was made and this was held to deprive the corporation of its property without due process of law.[1]

§ 483. **Taxation of Citizen at Domicil on Mortgages in Other States.**—The comprehensive power of the State to tax the personal property of its citizens was pointedly illustrated in Kirtland v. Hotchkiss,[2] where the court held that a citizen of Connecticut was properly assessed for taxation in Connecticut on bonds, owned by him, which were executed in Chicago and secured by a mortgage upon Chicago property. These bonds were assessed as part of his personal property. The court said:

"It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between the State and its citizens, can afford him no relief against State taxation, however unjust, oppressive or onerous."

And it added:

"The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

"That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicil of the creditor. It is none the less property, because its amount and maturity are set forth in a

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[1] Delaware, L. & W. R. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, reversing 206 Pa. 645 (1905).

[2] 100 U. S. 491, 25 L. Ed. 558 (1879).

bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and as held in State Tax on Foreign-Held Bonds (*supra*), the right of the creditor to proceed against the property mortgaged, upon a 'given contingency, to enforce by its sale the payment of his demands . . . has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein,' etc. The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the Federal government, for the reason, too obvious to require argument in its support, that such taxation violates no principle of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several States. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

"Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal Government cannot rightly interfere."[1]

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[1] For an interesting and vigorous discussion of this opinion from an economic point of view, see David A. Wells' "Theory and Practice of Taxation." For application of the rule established in this case to Federal taxation, see *infra*, Sec. 594.

§ 484. **State May Tax Resident Stockholder in Foreign Corporation Upon Value of Stock.**—While a State has the power to tax all shares of stock in corporations of its own creation, *supra,* Sec. 460, the State where the stockholder resides may also require him to list the same stock as part of his personal property. Personal property may acquire an independent *situs* for taxation in the jurisdiction where actually located, but this does not affect the jurisdiction of the State to tax the same property through the person of its owner. Thus, in a recent case in Michigan,[1] the court said that the question whether the capital stock of a foreign corporation is taxed in the State of the corporation's domicil is immaterial, since the shares of such capital stock in the hands of residents acquired a *situs* in Michigan for the purposes of taxation, and the law was not framed with reference to what other States might do. It was said by the Supreme Court of Ohio:[2]

"The constitutional power to tax shares of stock, owned by our citizens in corporations located without the State, does not depend on whether the capital of the corporation is or is not taxed in the State where the corporation is created. The power is the same, whether the capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the Constitution would be made to depend upon the operation of laws of foreign jurisdictions—a proposition so obviously ill founded, that the moment it is stated, its falsity becomes apparent."[3]

The same ruling was made in Rhode Island, where stock in a manufacturing company of Massachusetts, which was taxed at the domicil of the corporation, was held taxable at the domicil of the owner in Rhode Island, the court saying.[4]

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[1] Bacon v. Board of State Tax Commissioners, 85 N. W. Rep. 307 (1901).

[2] Bradley v. Bauder, 36 Ohio St. 28 (1880); see also Lee v. Sturges, 46 Ohio 153 and 2 L. R. A. 556 (1889).

[3] Citing Dwight v. Mayor, etc., 12 Allen (Mass.) 316 (1866).

[4] Dyer v. Osborne, 11 R. I. 321 (1876). See also Seward v. City of Rising Sun, 79 Ind. 351 (1881); Bacon v. Tax Commissioners (Mich.), 85 N. W. Rep. 307 (1901); McKeen v. County of Northampton, 49 Pa. St. 519 (1865). In Ogden v. City of St. Joseph, 90 Mo. 522 (1886), the court held, in construing the charters of cities of the second class, that the *situs*

"The laws of Rhode Island are paramount in Rhode Island, and all the inhabitants of the State are subject to them without regard to the laws of any other State. If there be any ground upon which the defendant is entitled to exoneration because of the Massachusetts tax, it is that clause of our Constitution which declares that 'the burdens of the State ought to be fairly distributed among its citizens;' and upon the claim that it is unfair to tax him in Rhode Island for property on which he has paid a tax in Massachusetts. We do not think, however, that the tax ought to be declared void under that clause of the constitution. It would certainly be going too far to hold that a man of wealth, living in Rhode Island, cannot be taxed at all in Rhode Island, if his property is all invested in the stocks of a manufacturing corporation of another State, and there subject to taxation. And if such a man can be taxed at all in Rhode Island, the question of how much, is, within reasonable limits at least, a legislative, not a judicial question."

The Ohio statute referred to above was also construed and enforced by the Supreme Court in a case from the United States Circuit Court in Ohio[1] where the court followed the decision of the Supreme Court of that State, above quoted, and held that an assessment under the statute upon a citizen of Ohio on stock of the Western Union Telegraph Company, a non-resident corporation, was valid, although the corporation paid taxes in Ohio on its property in that State. It was necessary for the complainant to show that his stock was exempted under the laws of Ohio. The court followed the State court in saying that the exemption in the statute only applied to shares of corporations which were required to return substantially all their capital and property in the State for taxation, and, as the property

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of shares of stock in a corporation was the residence of the owner where the contrary is not declared by statute; but in State *ex rel.* v. Lesser, 237 Mo. 310 (1911), the court in effect overruled this decision and held that shares of stock in a foreign corporation owning no property in the State, held in this State by a resident, could not, under the laws of the State, be assessed for taxation against such resident shareholder. The court held that such property had not been subjected to taxation under the laws of the State.

[1] Sturges v. Carter, 114 U. S. 511, 29 L. Ed. 240 (1885).

of the Western Union assessed in the State was but a small part of all its property, therefore the defendant was not entitled to the exemption of his stock. No Federal question, apparently, was raised in this case, the whole controversy turning upon the construction of the Ohio statute.

These rulings of the State courts were followed by the Supreme Court in holding that the States can tax stocks of foreign companies held by its citizens, and was not bound to make its statutes harmonize in principle with those of other States.[1]

The same ruling followed as to the taxability of stocks in foreign corporations under the Georgia Constitution and statute.[2]

§ 485. **No Immunity Under Federal Constitution of State Securities from Taxation in Other States.**—The State of Maryland included in the tax list of a resident of Baltimore certain securities of the registered public debt of the State and city of New York and other States, some of which were exempt from taxation in the State where issued and some actually taxed there. It was argued that the same property could not have at the same time more than one *situs* for taxation, and that the *situs* of this was in the State owing the debt. But the court said[3] that it was immaterial whether the debt was taxed in the debtor State or not, and that there was no immunity from taxation in Maryland under Art. IV, Sec. 1 of the U. S. Constitution, providing that full faith should be given in each State to the public acts of every other State. No State can legislate with reference to taxation in other jurisdictions or exempt from taxation property beyond its confines. The debt still remained a chose in action with all the incidents which appertain to that species of property. The court further said:

"It is true, if a State could protect its securities from taxation everywhere, it might succeed in borrowing money at re-

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1 Kidd v. Alabama, 188 U. S. 730, 47 L. Ed. 669 (1903), Justices Harlan and White dissenting.

2 Wright v. L. & N. R. Co., 195 U. S. 219, 49 L. Ed. 167 (1904), reversing 110 Fed. 1007. See also Central of Georgia R. Co. v. Wright, 166 Fed. 153 (1908).

3 Bonaparte v. Tax Court, 104 U. S. 592, 26 L. Ed. 845 (1882).

duced interest; but, inasmuch as it cannot secure such exemption outside of its own jurisdiction, it is compelled to go into the market as a borrower, subject to the same disabilities in this particular as individuals. While the Constitution of the United States might have been so framed as to afford relief against such a disability, it has not been, and the States are left free to extend the comity which is sought, or not, as they please.

"Taxation of the debt within the debtor State does not change the legal *situs* of the debt for any other purpose than that of the tax which is imposed. Neither does exemption from taxation."

§ 486. **Domicil and Location, as Situs for Taxation, in Same State.**—The question of the *situs* for taxation of intangible personal property, such as bonds, notes, credits, etc., has been frequently presented to the State courts, not only with reference to the taxability of the property within the State, but also as to the place of taxation therein, where the owner is domiciled in one place and the property is localized elsewhere in the same State, *e. g.*, securities in the hands of a local agent or the like. The taxable *situs* of such property may be and usually is regulated by statute of the State, but in the absence of express statute, personal property in the same State is usually held to be taxable at the domicil of the owner.[1] The Supreme Court of Alabama arrived at the same conclusion,[2] in deciding a case where the domicil and the property were in different cities of the State, saying:

[1] The New York Court of Appeals, construing the statute of that State and holding that the residence of the owner and not that of the agent, both of which were in New York, was the taxable *situs* of securities, said: "A person living in a city where taxation was onerous, would escape the burden by placing his assets in the hands of an agent in an outlying town, while the countryman whose property might, at the time of the assessment, be in the hands of his factor, broker or commission agent for use or investment would find it enlarged by city valuations, only to be diminished by taxes from which he could derive no benefit." Boardman v. County Supervisors, 85 N. Y. 359, p. 363 (1881).

[2] Boyd v. Selma, 16 L. R. A. 729, l. c. p. 732 (1892). This case contains a review of the authorities supporting the view that such property should be taxed at the domicil of the creditor.

"Passing to the question whether negotiable promissory notes are taxable at the domicil of the owner, or whether the *situs* of such property, and not the domicil of the owner, determines the liability to taxation, we find irreconcilable confusion in the adjudicated cases, as well as differences in the statement of the doctrine in the text-books. Much of this confusion results from a failure to observe the varying phraseology of the different statutes giving rise to the decisions, but in some instances the authorities differ in the statement of the general principle involved."

§ 487. **Double Taxation Not Presumed.**—While it is not practicable to formulate a rule, where the cases depend upon the construction of different State statutes and involve their phraseology, both as to what shall constitute taxable property in the State and as to the place in the State where the personalty shall be assessed, it has been frequently held that where bonds, notes and mortgages have had an independent *situs* given them in another State and have been localized there through a resident agent, or otherwise, so as to become subject to the taxing power of that State, they were not subject to taxation in the State of the domicil, unless expressly made so by statute. In other words, it is a rule of construction, repeatedly recognized by the courts in taxation cases, that double taxation will not be presumed to have been intended, and will only be enforced under express statutory mandate.[1] This is only mentioned as illustrative of the complications attending the attempt to reach this class of property, that is, notes, bonds and mortgages, for assessment. Though often liable to double taxation by the conflicting sovereign claims of the State of domicil and the State of location, a fact to which we find frequent reference in the decisions of the court, such property is rarely reached for taxation in any jurisdiction. These decisions are based upon statutory construction and no principle of due process of law is involved therein.[2]

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[1] See *supra*, Secs. 459, 462.

[2] Thus corporate shares of domestic corporations are as a rule held not taxable where the corporate property is taxed to the corporation, this being an obvious form of double taxation, which the courts say is

It has already been shown that a State may tax the shares of non-resident stockholders in its domestic corporations, enforcing payment through its control over the company; and may also tax the resident stockholders in foreign corporations upon the value of the stock held by them, regardless of the fact that the capital of the company or the property in which it is invested is taxed in other jurisdictions.

§ 488. **Due Process of Law and Double Taxation.**—Double or duplicate taxation may be enforced by a State or may result from the operation of the tax laws of a State without violating the constitutional guaranty of due process of law. It has been repeatedly recognized that duplicate taxation, to a certain extent, cannot be avoided in State tax systems. Thus may be taxed both property and the money that is paid for the property; land and the mortgage upon the land; property and the income from the property;[1] the capital invested in a business and the privilege of conducting the business; capital stock of a corporation, the property in which the capital is invested, and the shares in the hands of the holders. Some of these cases of

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not presumed. Thus in Lewiston Water & Power Co. v. Asotin Co., 24 Wash. 371 (1901), the court said that such double taxation was illegal in the absence of special legislative authorization, although double taxation was not expressly prohibited by the Constitution. See also to the same effect, People *ex rel.* v. Badlam, 57 Cal. 594 (1881).

In Citizens' Street Ry. Co. v. Common Council, 125 Mich. 673 (1901), the court held, although there was no express constitutional prohibition against double taxation, that an act for assessing corporate property by deducting the value of real estate from the market value of the stock, and the indebtedness from the cash value of the personal property, and assessing as personalty the balance so found, was void. The court said that this would be double taxation, because if the company had no debts or real estate, all of the property would be taxed twice as personal estate. In People v. Coleman, 135 N. Y. 231, the court in speaking of double taxation, said: "If that had been attempted, some way would have been found to defeat it, as that would be against public policy, the purpose of the laws and natural justice." See also State v. Thomas, 26 N. J. L. 181 (1857). But see *contra* as to double taxation of corporate property and stock, City of Memphis v. Ensley, 6 Baxter (Tenn.), 553 (1873).

[1] But, see on this point, income tax decision of 1895, Sec. 560, *infra*.

double taxation are usually avoided by statute or custom. Thus the holders of shares of stock and the capital stock in domestic corporations are usually exempted from taxation, where the corporate property is taxed.[1] In some States mortgages are not taxed where the property mortgaged is taxed. But assuming that there is no discrimination as between taxpayers in the same class, the power of the State to tax twice is said to be the same as the power to tax once, that is, no constitutional question is raised by the exercise of that power. Double taxation does not necessarily consist in assessing the same property twice to the same person, but may consist in requiring a double contribution to the same tax on account of the same property, though the assessments are to different persons.[2]

Thus in the taxation of domestic corporations where the tax is levied upon the capital stock, though the holders of the stock in the State may not be taxed, the stock of the corporation only represents the property of the corporation, and that may be located in different States and subject to the taxing power of such States. This form of double taxation therefore cannot be avoided, where the tax is on the corporate stock, as representing the property of the corporation, as the latter is subject to the taxing power of other States where the property is located, while the former is not. The only effective method therefore of avoiding double taxation in the taxing of corporations, is to tax the property of the corporations where it is located, exempting individuals from taxation on their stock, and if it is desired to derive additional revenue from the exercise of the corporate franchise, to impose a special franchise tax upon the privilege of acting as a corporation. Under the complications resulting from corporate entities doing business and holding property in different States double taxation of the same property cannot otherwise be avoided.[3]

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[1] See cases, *supra*, Sec. 487.

[2] Germania Trust Co. v. San Francisco, 128 Cal. 589 (1900); see also Estate of Fair, 128 Cal. 607 (1900).

[3] See State *ex rel.* v. Bodcaw Lbr. Co., 194 S. W. 692 (1917), where the Supreme Court of Arkansas held that the laws of the State prohibited double taxation, but enforced a system of State taxation of

§ 489. **Double Taxation from Competing State Authorities.**—While some forms of double taxation, particularly in case of corporations, may be avoided where the taxes are levied in the same State, and usually are avoided, as in the case of corporations and the stockholders therein, there is, as we have seen, a continual liability to double taxation resulting from the subjection of the same property to the taxing power of two jurisdictions, or where the paper evidence of property is in one State and the property itself in another. Thus, we may have cases of double taxation though the same may be directly prohibited by the Constitution and laws of the State. These complications grow out of our complex form of government as well as out of the prevailing use of the corporate entity in the transaction of business.

It was said by one of our most eminent economic authorities on taxation:[1]

"Amid the complexities of modern industrial life equality of taxation cannot be attained without a careful consideration of these problems. Today a man may live in one State, may own property in a second, and may carry on business in a third. He may die in one place and leave all his property in another. He may spend all his income in one town and may derive that income from property or business in another town. He may carry on business in several States, or if he has invested in corporate securities, the corporation may be the creature of another State, and be situated or do business in a third. All these cases may affect foreign States or separate commonwealths of the same Federal State, or separate cities or counties of the same commonwealth. The possible entanglements are well-nigh innumerable."

§ 490. **Interstate Comity Essential to Avoid Double Taxation.**—These problems, however, must find their solution in the elevation of public opinion bringing about a recognition of

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corporations which only allowed deduction for the taxable property located in the State. The court said that this method of taxation was consistent with the ruling of the Supreme Court in D. L. & W. R. R. Co. v. Pennsylvania, *supra*, Sec. 482.

[1] Seligman's Essays on Taxation, p. 107.

interstate comity in taxation for which the courts have frequently appealed, but which they are powerless to effect.

The Supreme Court has said, by Justice Miller,[1] that they knew of no provision of the Federal Constitution which forbids a State from taxing the same property twice for the same purpose. It seems that the States can be restrained from avowedly taxing property beyond their jurisdiction, for example that of interstate carriers under the unit and mileage rules. But they cannot be restrained from taxing persons and property within their jurisdiction irrespective of the action of other State sovereignties upon the same property. In other words, the complications growing out of the fact, that the property may exist in one State and the paper representing it in another, may involve a form of double taxation by competing State sovereignties, in which they cannot be restrained under the operation of the Fourteenth Amendment.[2]

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[1] Davidson v. New Orleans, 96 U. S. 97, l. c. p. 106, 24 L. Ed. 616 (1878).

[2] This subject was carefully considered by the National Conference on Taxation, held at Buffalo, New York, May 23, 1901, under the auspices of the National Civic Federation, attended by representatives, both economists and men of large practical experience in taxation, appointed by the governors of some thirty States. The Conference unanimously adopted the following resolution, after full discussion, as expressive of its views:

"Whereas, Modern industry has overstepped the bounds of any one State, and commercial interests are no longer confined to merely local interests; and

"Whereas, The problem of just taxation cannot be solved without considering the mutual relations of contiguous States; be it

"Resolved, That this Conference recommend to the States the recognition and enforcement of the principles of interstate comity in taxation. These principles require that the same property should not be taxed at the same time by two State jurisdictions, and to this end that if the title deeds or other paper evidences of the ownership of property, or of an interest in property are taxed, they shall be taxed at the *situs* of the property, and not elsewhere. These principles should also be applied to any tax upon the transfer of property in expectation of death, or by will, or under the laws regulating the distribution of property in case of intestacy."

It was said by the Supreme Court in a case from Alabama:[1]

"No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. . . . The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all."

§ 491. Double Taxation Under the Federal Government.—Notwithstanding this possibility, in the United States, of double taxation in the popular sense[2] under the conflicting systems of State taxation, where the property and its owners are in different States, it is nevertheless true that there is a very substantial Federal protection of both individuals and corporations against arbitrary abuse of the State taxing power, first, in that any substantial interference with interstate commerce is invalid, and, second, in that the guaranty of due process of law and the equal protection of the laws under the Fourteenth Amendment protect both the individual and the corporation against any arbitrary discrimination; and, as hereafter shown, any discrimination not based upon rational classification in taxation, falls under the Federal condemnation.

There is another form of double taxation which grows out of the very nature of our Federal system and was anticipated in the discussions of the "Federalist" before the adoption of the Constitution, in the exercise of the taxing power upon the same subjects by the State and Federal governments.[3] As will be hereafter seen, the taxing power of the Federal government has been vastly expanded under a broad construction of the constitutional grant, and especially since the adoption of the Sixteenth Amendment, whereunder the Federal Income Tax

[1] Kidd v. Alabama, 188 U. S. 730, 47 L. Ed. 669 (1903).

[2] Grigsby Construction Co. v. Freeman, 108 La. 435, 58 L. R. A. 349 (1902), citing Coe v. Errol, *supra*.

[3] See Sec. 3, *supra*.

reaches incomes from all sources. Federal and State taxes are now levied upon the same inheritances, the same incomes, and other subjects of taxation. Thus are raised again the questions of expediency regulating the exercise of these taxing powers, which are necessarily referred to the determination of those who are responsible for their judicious exercise.

There is another form of double taxation growing out of the fact that not only are the Federal and State Income Taxes levied upon the same income, but the State Income Taxes may be levied upon the use of the same property which is itself taxable by the State. It was ruled in the Income Tax Cases in 1895, that the taxation of the income, that is, on the use of property, was the legal equivalent of the tax upon the property itself.[1] As will be seen in the review of the State taxing systems, some of the States which have adopted income taxation, have avoided this form of double taxation by exempting property from which the income is derived.[2]

§ 492. **Due Process of Law and Inheritance Taxation.**— Property was not taken without due process of law by imposing a transfer tax under the New York general transfer tax law of 1897, upon the exercise by will of the power of appointment by a deed executed prior to the passage of such statute.[3]

Nor are universal legatees under a will and the transfer by deed before the enactment of the Louisiana inheritance tax law of June, 1904, deprived of their property without due process of law by the subjection of their shares to the tax imposed by that statute, although under the Louisiana Civil Code the ownership of the property passed to such legatee upon the death of the deceased.[4]

A fund represented by stocks, bonds and notes kept in a State

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[1] See Sec. 560, *infra*.

[2] See Massachusetts, Missouri and Wisconsin Taxing Systems, appendix, *infra*.

[3] Chanslor v. Kelsey, 205 U. S. 466, 51 L. Ed. 882 (1907), affirming 183 N. Y. 543.

[4] Cahen v. Brewster, 203 U. S. 543, 51 L. Ed. 310 (1906), affirming 115 La. 377.

other than where the decedent resided, which he conveyed upon certain trusts to a trust company of another State, reserving to himself an absolute power of control, which he exercised during his life by revocation (followed by a second conveyance to the trust company upon the same terms) by taking the whole income for himself, was held lawfully subject to the inheritance tax in the State of his domicil without violation of the due process of law or the contract clause of the Federal Constitution.[1]

§ 493. **Duplicate Inheritance Taxation.** — The duplicate taxation of inheritances, that is by both Federal and State governments, is a necessary result of two sovereignties having jurisdiction in the same territory exercising their taxing power upon the same subject.

There is, however, double taxation of inheritances in another form, where the decedent domiciled in one State at his death owns personal property in other States, which is subject to the latter's taxing laws. Thus a State may impose a tax not only upon the inheritance by will, or its own intestate laws, of the property of decedents domiciled therein, but may also impose a tax upon the property located in its territory which passes under the inheritance laws of any other State. Thus the decedent may have been domiciled in one State, his personal property may be located in another State or in a foreign country, while the heir or legatee may live in a third jurisdiction. Thus in New York the courts have enforced the inheritance tax of that State against the money on deposit in a New York bank belonging to a citizen of Pennsylvania. The court said that "the case is one of some hardship, for the reason that the *whole estate* of the decedent is taxable in Pennsylvania, and, if the property referred to is taxable here, the right of succession to it will cost 10 per cent of its value. . . . It is unfortunate that the laws of the different States relating to succession taxes are not uniform and framed to prevent double taxation."

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[1] Bullen v. Wisconsin, 240 U. S. 625, 60 L. Ed. 830 (1916), affirming 143 Wis. 512.

[2] *In re* Burr's Estate, 38 N. Y. Supp. 811 (1895), and cases cited in the opinion.

In another case the same principle was extended by the New York Court of Appeals to bonds of a foreign corporation and bonds and certificates of stock of domestic corporations, owned by a non-resident decedent but deposited in a safe deposit vault within the State. United States bonds, however, were held not to be included in the words of the statute. The court said the legislature intended to repeal the maxim *mobilia personam sequuntur* so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of that State.[1]

Under the same statute the shares of the capital stock of a domestic corporation, though the certificates were in another State in the possession of a non-resident decedent at the time of his death were declared "property within the State," while bonds of a like corporation held in like manner[2] were not included in the designation "property within the State."

On the other hand, in New York personal property of a resident decedent, wheresoever situated, whether within or without the State, was subject to the inheritance tax,[3] as this was imposed on the right of succession, which was based on the enabling legislation of the State.

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[1] *In re* Whiting's Estate, 150 N. Y. 27, and 34 L. R. A. 232 (1896); see also Hondayer's Estate, 150 N. Y. 37, and 34 L. R. A. 235 (1896).

[2] *In re* Bronson, 150 N. Y. 1, and 34 L. R. A. 238 (1896).

[3] *In re* Estate of Swift, 137 N. Y. 77, and 18 L. R. A. 709 (1893).

In Orcutt's Appeal, 97 Pa. 179 (1881), the Pennsylvania statute was construed as including only personal property of a tangible nature actually situated or used for business purposes within the State. But in a later case, *In re* Lewis' Estate, 52 Alt. Rep. 205 (1902), it was held that the intangible personalty of a non-resident decedent was subject to the collateral inheritance tax within the State, where the executor having taken out ancillary letters elects to have full distribution of the fund made there and this is acquiesced in by the legatees. The court said the same result would follow where property was in possession and control of a resident agent with power of investment and reinvestment. For collection of cases, both English and American, on the subject of resident and non-resident decedents in inheritance taxation, see Dos Passos on Inheritance Law, 2d Ed., Sec. 47.

§ 494. **The Supreme Court on Duplicate Inheritance Taxation.**—The Supreme Court in a series of decisions has held that each State has a right to tax the inheritance of its own citizens, regardless of the legislation of other States. Thus, beneficiaries under the will of a non-resident could not invoke the Constitution to prevent taxation under the New York inheritance tax law on the transfer under such a will of debts due the decedent by its citizens, though the entire inheritance was taxable in the State of the decedent's domicil.[1]

It was held also that the transfer tax authorized by the laws of New York when personal property is transferred by a resident of the State by deed intended to take effect at her death, may validly be imposed, although at the time of the grantor's death when the payment of the tax is required, the property is in another State in the hands of a trustee holding the title and possession by virtue of such deed.[2]

§ 495. **Question One of Construction and Not of Legislative Power.**—It is clear, therefore, that this question of duplicate taxation under inheritance tax laws is one of the intent of the legislature as shown in the construction of the statute, and not a question of the power of the State. As the right of inheritance either in the case of wills or intestacy is dependent upon the statute, the State can impose conditions upon the enjoyment of this right wherever the personal property is located. On the other hand, the State has the power to tax, whether in property or inheritance taxation, the property localized within its jurisdiction. The cases in the State courts upon this matter of duplicate taxation are all dealt with upon the question of construction and not of power.

This distinction is clearly illustrated by the decision of the Supreme Court in construing the inheritance tax law enacted by Congress in 1898, as not including the personalty in this country passing under will or intestacy of parties domiciled

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[1] Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439 (1903), affirming 171 N. Y. 682.

[2] Keeney v. New York, 222 U. S. 525, 56 L. Ed. 299 (1912), affirming 194 N. Y. 281.

abroad. While it was within the power of Congress to tax the succession in such cases, it had not done so.[1]

§ 496. **Due Process of Law in Taxation Requires Legislative Authority.**—Due process of law in taxation requires not only that a tax must be levied for a public purpose appertaining to the district taxed, and upon property, business or persons within the lawful jurisdiction of the State, but also that the taxing power be exercised by the legislative authority of the State. The power of taxation is a sovereign power exercised by the legislative authority of the government, and taxes can only be collected when the property has been assessed and taxes collected in the mode specifically prescribed by law. The subject of taxation under constitutional limitations, Federal and State, are to be selected by the legislative discretion and the taxes levied under a definite rule of apportionment, with provision for valuation and hearing where taxes are upon value. The failure of the legislature to exercise this authority cannot be supplied by executive officers, or by the courts. This sovereign legislative power of taxation cannot be delegated, except to the municipal subdivisions of the State.

This fundamental canon of taxation was forcibly illustrated in the decision of the Supreme Court of Indiana, holding that life insurance policies, although "property" within the State and therefore subject to the taxing power of the State, had not been subjected to taxation by the General Assembly.[2] The State constitution provided that "all property within the jurisdiction of the State, not expressly exempted, should be subject to taxation;" and it also provided that "the General Assembly shall . . . prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal . . . etc . . . purposes, as may be specially exempted by law." The statute specifically prescribed what "personal property" should include, mentioning different classes; and also provided what

[1] Eidman v. Martinez, 184 U. S. 578, *supra.*

[2] State Board of Tax Commissioners v. Holliday, 150 Ind. 216 (1898), two of the five judges dissenting.

should be included in the schedule required to be filed by the taxpayer, life insurance policies not being mentioned in either enumeration, although the latter contained in the concluding clause, "all other goods, chattels and personal property, not heretofore specifically mentioned, and their value, except property specifically exempt from taxation." The State Board of Tax Commissioners had directed the local assessor to include life insurance policies, and furnished directions for their valuation. The State court held that this was unauthorized and illegal, and the collection of the tax was enjoined.

In this case, and in other cases[1] under similar provisions in State constitution, the mandate of the constitution is addressed to the legislative discretion and necessarily requires legislative action in the selection of the subjects of taxation. Thus the court said in this case:

"It is, therefore, a legislative power to select the subjects for taxation, and this constitutional provision imposes the duty and limitation upon the legislature of providing by law regulations or methods for a just valuation of all property, both real and personal, for taxation. Where the legislature has not exercised this power, no other department of the State government can supply the omission, and where no such regulation has been prescribed by law as to any particular species of property, then such property cannot be taxed. This conclusion may rest either on the inference from such failure to prescribe such regulations that the legislature did not intend to select that particular species of property as a subject of taxation, or, regardless of the legislative intent, the failure to prescribe such regulations leaves such property unselected as a subject of taxation."

[1] Riley v. Western Union Tel. Co., 47 Ind. 511 (1874); County of Erie v. City of Erie, 113 Pa. St. 360 (1886); Louisiana Co. v. New Orleans, 31 La. Ann. 440 (1879); Mississippi Mill v. Cook, 56 Miss. 40 (1878); Maguire v. Board of Commissioners, 71 Ala. 401 (1882); Stratton v. Collins, 43 N. J. L. 562 (1881). In Loan and Homestead Association v. Keith, 153 Ill. 609 (1894), an act declaring stocks and notes of Homestead and Loan Association not subject to taxation was held to be unconstitutional as an exemption prohibited by the constitution. As to the legislative power in the absence of constitutional restriction, see the exhaustive opinion in Wisconsin Central R. R. Co. v. Taylor Co., 52 Wis. 37 (1881).

This principle was also declared by the Supreme Court of Missouri in holding that shares of stock in a foreign corporation owning no property in Missouri, but held within the State by a resident of the State, could not, under the laws of the State, be assessed for taxation against the shareholder. The court said that only property is taxable which is required by law to be assessed for taxation, and that there was nothing in the statutes of the State to indicate that the words "subject by law to taxation in this State" were meant to include the stock of a foreign corporation which had no property in the State. In other words, such property had not been subjected to taxation by the General Assembly.[1]

The legislative power of taxation is inherent, and the State constitution is only operative as a restraint, not as a grant of power. It is in this respect distinguished from the taxing power of Congress, which, as hereafter shown, is based upon the grant of the United States Constitution. The mandate of the State constitution is not effective as a restraint upon legislative power when it is made dependent upon affirmative legislative action, and is consequently necessarily addressed to legislative discretion, as there is no method of enforcing legislative action by judicial authority, even in obedience to such a constitutional mandate. A State tax therefore does not require an express authorization in the State constitution, but it does require express legislative authority.[2]

Thus a constitutional provision that all laws exempting property from taxation shall be void applies to affirmative exemptions, not to laws which do not in terms exempt certain property, and not to mere casual omissions. While the Constitution may make it the clear duty of the legislature to see that no class of property in the State escapes taxation, unless the legislature exercises its legitimate function and subjects certain

[1] See State *ex rel.* v. Lesser, 237 Mo. 310 (1911).

[2] The cases arising under constitutions directing legislative action must be distinguished from those under constitutions which are construed as specifically legislating on taxation, naming the subjects of taxation, leaving no room for legislative discretion, see People v. Keith, 153 Ill. 609 (1894); see constitutions *infra*, Appendix.

property to taxation, the constitutional provision cannot, because of such lack of legislation, become self-enforcing.[1]

§ 497. **State Construction of Legislative Authority Conclusive.**—While the legislature must select the subjects of taxation and make that selection effective by necessary regulations for assessment, this does not mean that every species of property must be specifically named for taxation. General words of description are sufficient, as the question is one of determining the legislative intent by the ordinary rules of statutory construction. "General words in any instrument or statute are strengthened by exceptions, and weakened by enumeration."[2] The courts will also presume that the legislature intended to carry out the directions of the constitution, and will so construe the statute, whenever such construction is admissible.

But "due process of law" in this sense, the exercise of the taxing power of the State under its constitution and statutes, is conclusively determined by the State courts, and involves no Federal question after such determination has been made. The taking of property by State taxing officials, without due process of State law, is a violation of the Federal as well as the State constitution; but the judgment of the State court is conclusive as to the construction of its constitution and statutes; and that construction will be followed by the Federal courts, in whatever form their jurisdiction may be invoked.

Thus in Arkansas the State constitution declared that all laws exempting property from taxation, other than as provided therein, should be void; and further declared that all property subject to taxation should be "taxed according to value to be ascertained, in such manner as the General Assembly shall

[1] Supreme Court of Missouri in Kansas City v. Building and Loan Association, 145 Mo. 50, 53 (1898). It was held in the same State that where the revenue laws direct the assessment and taxation of "all real estate not exempt therefrom," these provisions are broad enough to include property held by a municipality as trustee for charitable uses, St. Louis v. Wennecker, 145 Mo. 230 (1898).

[2] Supreme Court of Pennsylvania in Sharpless v. Mayor of Philadelphia, 21 Pa. St. 147 (1853).

direct, making the same equal and uniform throughout the State." The legislature passed an act directing the Board of Railroad Commissioners not to include in the schedule of property of railroad companies assessed by them "embankments, tunnels, cuts, ties, trestles or bridges." The State board declined to follow this direction, deeming the act unconstitutional, and included this property in the assessment. The railroad company sought in the State court to enjoin the entire assessment on the ground that the action of the board was not in conformity to the statute, and that if the statute was void, the whole assessment fell with it. The State court, and the Supreme Court of the State on appeal, held that the act was unconstitutional, but that it was clearly separable from the revenue act, and that the assessment was valid. The suit was carried to the Supreme Court by writ of error, and at the same time was heard another case, wherein suit had been filed in the United States Circuit Court by the non-resident trustees of a mortgage of the railroad company seeking the same relief, and wherein demurrer had been sustained, and the bill dismissed in the Circuit Court.

The Supreme Court[1] affirmed the judgment of the Circuit Court, and dismissed the writ of error to the State Supreme Court because there was no Federal question involved, saying on this latter point:

"The complaint of the plaintiff's in error and appellants is, that the board of railroad commissioners did not follow the act of the legislature. If that act was valid, no ground lay for complaint that the State had done anything to deprive the company of its property without due process of law. If the act was, in the particulars mentioned, unconstitutional, as the Supreme Court of the State afterward held, there was no just ground on complaint that the railroad commissioners had refused to follow its directions."

In affirming the judgment of the Circuit Court it was said, that under the State constitution laws which produce exemptions indirectly must be equally inoperative with those which

[1] Huntington v. Worthen, 120 U. S. 97, 30 L. Ed. 588 (1887).

exempt directly; that the conflict between the statute and constitution was obvious, and the unconstitutional part of the act was clearly separable from the remainder.

§ 498. **The Constitutionality of Statutes is for Judicial, Not Executive Determination.**—In the cases cited in the three preceding sections, the action of the State taxing board was in direct opposition to the rule that the constitutionality of statutes is for judicial, not executive determination. In the Indiana case the taxing board undertook to supply the omission of the legislature in carrying out the directions of the constitution, and this it was held they had no power to do. In the Arkansas case the tax commission refused to follow the directions of the legislature, because they were advised that the act was in conflict with the constitution. In this they were subsequently sustained for the reason that the act was held by the court to be unconstitutional. There was, however, no conflict with the law declared in the Indiana case, as there is a clear distinction between the power to declare invalid a legislative act, conflicting with a prohibitory constitutional provision, and the authority of an executive board to supply the omission of the legislature to obey the direction of the Constitution.

On the question of the right of the Arkansas board to pass upon the validity of the legislative act, the Supreme Court said:

"It may not be a wise thing, as a rule, for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it, if in their judgment it is invalid. This may be a hazardous proceedng to themselves, and productive of great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action. An unconstitutional act is not law; it binds no one, and protects no one."[1]

[1] See State v. Auditor, 47 La. Ann. 1679 (1895), where the right of executive officers to pass upon the constitutionality of a law is denied.

CHAPTER XV.

EQUAL PROTECTION OF THE LAWS.

§ 499. Immediate purpose of clause.
500. What is "the equal protection of the laws"?
501. Equality in taxation under Fourteenth Amendment.
502. Equality and efficiency in taxation through diversity of methods.
503. Classification for taxation.
504. "Equal protection of the laws" does not require iron rule of equal taxation.
505. The equal protection of the laws in corporate taxation.
506. Foreign corporations and "equal protection of the laws."
507. Foreign interstate carriers and the equal protection of the laws.
508. Specification of railroads is reasonable classification for taxation.
509. Special methods of assessment of railroad property sustained.
510. Right of appeal not essential to "equal protection of the laws."
511. Exemption of producers in license taxation.
512. Classification in taxation and in police legislation compared.
513. Difficulty of classification.
514. Inequality of burden does not establish invalidity of tax.
515. Equality and uniformity in inheritance taxation.
516. "Equal protection of the laws" in inheritance taxation.
517. The Supreme Court on inheritance taxation and equal protection of the laws.
518. Classification by amount in license taxation.
519. Property taxation and inheritance taxation distinguished.
520. Classification by exemption.
521. Exemption for efficiency in taxation.
522. Exemption of certain Michigan telephone companies valid.
523. Conditions which warrant classification.
524. Constitutional amendment held unconstitutional.
525. Department Store Tax held unconstitutional.
526. Taxation of employers of foreign-born persons held invalid.
527. Discriminations between residents and non-residents.
528. Illegal discrimination in license taxation.
529. Street railroads and equal protection of the laws.
530. The Supreme Court on classification in license or occupation taxation.

531. Discrimination in expenditure of public funds.
532. Equal protection of the laws in tax procedure.
533. Discrimination between races in expenditure of school funds.
534. Federal and State guaranties of equal taxation.

§ 499. **Immediate Purpose of Clause.**—The guaranty in the Fourteenth Amendment of the equal protection of the laws to all persons within the jurisdiction of the State has been invoked in numerous cases of alleged discrimination, not only in taxation, but also in the exercise of the police power of the State.

This phrase, unlike the historic phrase "due process of law," was novel in American constitutional law, and its incorporation in the amendment, as shown by the history of the time, was clearly for the purpose of emphasizing the principle of equality of civil rights for the benefit of the newly enfranchised freedmen. Attention has already been called to the difference in the language of the two prohibitions. The State must not deprive *any person* of life, liberty or property without due process of law, but the equal protection of the laws is limited to persons *within its jurisdiction,* so that a foreign corporation, not admitted to do business in the State and therefore not within its jurisdiction, could not claim the protection of this clause in the Fourteenth Amendment. The purpose of this provision and its application to discriminations in taxation are clearly shown in the Act of Congress already referred to,[1] which, was enacted to enforce this primary purpose of the amendment, and declares that all persons within the jurisdiction of the United States shall have equal rights with white citizens, including equal rights in taxation.

§ 500. **What is "the Equal Protection of the Laws?"**—The Supreme Court has declined to define what is the equal protection of the laws. Thus it was said in holding invalid the anti-trust law of Illinois:[2]

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[1] Sec. 1977, R. S. U. S., *supra*, Sec. 332.

[2] Connolly v. Union Sewer Pipe Co., 184 U. S., l. c. 558, 46 L. Ed. 679 (1902), affirming 99 Fed. 354.

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a State enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances.'"

The court in this and in other cases quoted the language of Mr. Justice Field upon the amendment in one of the early cases,[1] where he said "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights," and, "that class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

§ 501. **Equality in Taxation Under Fourteenth Amendment.**—The guaranty of the equal protection of the laws, therefore, is directed against *arbitrary discriminations* in taxation, and in this sense secures equality in taxation. In this, however, no new right in relation to taxation is created. The power to tax was inherent in the sovereignty of the States before, as it has been since, the adoption of the amendment. In the language of the Supreme Court,[2] the "amendment conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty, and property that previously existed under all State constitutions." The guaranty of equal protection of the laws therefore protects the citizen against arbitrary discriminations effected by the

[1] Barbier v. Connolly, 113 U. S. 27, p. 31, 28 L. Ed. 923 (1885).

[2] Mobile & Ohio R. Co. v. Tennessee, 153 U. S., l. c. 506, 38 L. Ed. 793 (1894).

State in the exercise of its power of taxation, as it protects him against the arbitrary exercise of any of the powers of government.

Mr. Justice Miller said in the opinion in Davidson v. New Orleans,[1] in reference to the claim that plaintiff's property had previously been assessed for the same purpose and the assessment paid, "if this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the States." This must, however, be construed with reference to the facts of the case before the court, which involved a special assessment for a public improvement.[2] The claim of double and unequal taxation was apparently based upon the levy of this tax in addition to that for general public purposes upon complainant's property with other property of the State. It is clear that the equal protection of the laws does not prevent that form of double or unequal taxation.

The equality, therefore, which is protected by the Fourteenth Amendment is that which is inherent in taxation, and is essential to a valid exercise of the taxing power. There should be, not only a public purpose pertaining to the district taxed, but also an apportionment by the legislative power levying the tax with reference to a uniform standard. If contribution is not required according to this principle of apportionment, equally and uniformly from all of the same class of subjects within that jurisdiction, it is not a tax, but an arbitrary exaction. Uniformity and equality in this sense, like a public purpose,[3] are involved in the very conception of taxation. These fundamental principles are declared by many of the State constitutions, some of which contain also the provision that taxes shall be levied for a public purpose only; but such provisions do little more than state in precise language the principles of constitutional

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[1] See Sec. 398.

[2] Ch. XIII, *supra*.

[3] Loan Assn. v. Topeka, *supra*, Sec. 377.

law which, whether declared or not, would inhere as essential limitations in the power of taxation.[1]

§ 502. **Equality and Efficiency in Taxation Through Diversity of Methods.**—It is not, however, necessary to uniformity and equality in this fundamental sense that all the subjects of taxation in the State should be taxed in the same manner or by the same system of assessment. This would obviously be impossible, as the taxing power extends not only to property, but to occupations and persons within the State's jurisdiction, and the same rule of assessment could not be applied to these different classes of subjects. Even as to property taxation alone, the complicated conditions of modern industrial civilization and the mobility of many forms of personal property which effectually elude the tax-gatherer, require special adjustment of taxing systems to insure even an approximation to equality in the distribution of public burdens.

The general property tax, that is, the taxation of everything, tangible and intangible, seen and unseen, by one uniform rule, is the natural outgrowth of our political conditions, but has proven inadequate in the complexity of modern conditions and often develops grave inequalities. This has been pointed out by an eminent economist,[2] who says that a tax which aims to be equal but is ineffectual, produces a kind of inequality, tending to increase as time goes on, and worse than all other kinds; but that a tax which aims to be *effective,* even in apparent disregard of equality, tends by a constant process of economic adjustment to be more and more equal.[3]

§ 503. **Classification for Taxation.**—It necessarily follows therefore that special forms of taxation adjusted to different classes of property are found essential in the administration of State taxing systems, and, in the absence of specific constitutional restrictions requiring all property to be taxed according

[1] Cooley on Constitutional Limitations, 2d Ed., p. 546.

[2] President Hadley of Yale University in Johnson's Encyclopedia title "Taxation."

[3] See also the New York Tax Commissioners' Report of 1871; David A. Wells' "Theory and Practice of Taxation."

to the same method of assessment, are consistent with the fundamental principles of equality and uniformity inherent in taxation. Thus it has been determined that the right to levy special assessments for public improvements[1] is consistent with these principles, provided the assessment is uniform in the same taxing district, and the constitutional requirement in many State constitutions that taxes upon property shall be in proportion to value has been held not to apply to other forms of taxation, such as taxes upon business, incomes and the like, provided they are uniform upon the same class of subjects.[2] A very large discretion therefore is necessarily vested in the legislature, in order that, subject to the requirements of the State constitution in regard to selecting, specializing and classifying the subjects of taxation, it may adjust the system of taxation to local conditions, so as to assure the nearest approximation to equality. This right to select, specialize and classify is for the purpose of best securing equality in taxation through the efficiency of the system adopted, and is clearly distinguished in its very nature from discriminations in classification which are made for the very purpose and which have the necessary result of imposing upon obnoxious classes a burden from which favored classes are relieved.

The right to specialize and classify for taxation must be exercised subject to the restrictions in the State constitution, which in many cases requires all property to be taxed according to a uniform rate, and thus precludes the subjection of any property to a different rate.[3] Under such constitutional restrictions

[1] *Supra*, Ch. XIII.

[2] Glasgow v. Rowse, 43 Mo. 479 (1869).

[3] Thus it was held in Oregon, Ellis v. Frazier, 53 L. R. A. 454 (1901), that the imposition of a specific tax of $1.25 upon each bicycle regardless of value, for the construction of bicycle paths, violated a constitutional requirement that the rates of taxation must be equal and uniform. In Smith v. County Commissioners, 117 Ala. 196, a tax of one dollar upon each road wagon, for the benefit of public roads, was held to violate a similar constitutional provision. And in Pittsburgh, etc., Railroad Co. v. State, 49 Ohio St. 189, and 16 L. R. A. 380 (1892), a statute requiring railroads to pay a dollar a mile for each mile of track was held invalid under the State Constitution.

it may become important to determine whether a tax is levied as a property tax or as a license tax upon the business conducted or privilege exercised. If a property tax, it must be levied, under the rule of uniformity, according to the rate limited by the constitution; while, if a business or privilege tax, it is not subject to such requirement, though it must be uniform upon all of the same class of subjects.[1] The equal protection of the laws guaranteed by the Federal constitution has of course no relation to such specific restrictions in State constitutions. It recognizes the right to specify and classify whether in property or business taxation, and only requires that the classification be on a reasonable basis and that the tax be uniform and equal as to all of the same class.[2]

§ 504. **Equal Protection of the Laws Does Not Require Iron Rule of Equal Taxation.**—The Supreme Court has uniformly observed the distinction between the equality in taxation, which is inherent in the conception of a tax, and that which is enforced by the requirement that everything shall be taxed in the same manner, and has in a number of cases affirmed the power of the State to make reasonable classifications in the adjustment of its system of taxation according to its own judgment of the public needs. The leading case on this subject is Bell's Gap Railroad Co. v. Pennsylvania,[3] wherein the court affirmed on

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[1] See State *ex rel.* v. Stephens, 146 Mo. 662 (1898).

[2] In State v. Travelers' Ins. Co., 73 Conn. 255, there being no provision in the State Constitution restricting the legislative power of taxation, the court denied that the Constitution of the United States contains any provision, express or implied, requiring taxation to be equal and uniform. The question involved was as to the validity of the classification for taxation of resident and non-resident corporation stockholders, and the decision was affirmed by the Supreme Court, 185 U. S. 364, 46 L. Ed. 949 (1902), *supra*, Sec. 460, as not involving any discrimination. The State court said in its opinion that the legislature could not make any exaction it pleased under the form of a tax, as an arbitrary exaction would be neither taxation nor legislation. "Such guaranties are not limitations upon the power of taxation, but on all power."

[3] 134 U. S. 233, 33 L. Ed. 892 (1890).

motion the judgment of the Supreme Court of Pennsylvania. This case involved the validity of a law of Pennsylvania, subjecting all moneyed securities to a tax at the rate of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which were taxed at three mills on the dollar of their nominal or par value. The Supreme Court, through Mr. Justice Bradley, declared that this was not an unjust discrimination. The presumption is that corporate securities are worth their face, and under the law the persons who held them were not affected by the tax unless they received the interest from which the tax was paid.

The court said that the provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to compel the State to adopt an iron rule of equal taxation, or to prevent the State from adjusting its system of taxation in all proper and reasonable ways. All such regulations were within the discretion of the State legislature and of the people of the State in framing their constitution, but clear and hostile demonstrations against particular persons and classes especially such as are of an unusual character unknown to the practice of our governments might be obnoxious to the constitutional provision. It would be impracticable and unwise, however, to attempt to lay down any definite rule or definition on the subject that would include all cases. They must be decided as they arise. The States differed materially in their systems of taxation, and it would have worked a marked revolution, if this section of the Fourteenth Amendment had been construed as compelling a cast iron rule of equal taxation. Doubtless it would prohibit a State from casting the sole burden of taxation upon some obnoxious person or persons, but did not prevent the State from exercising its judgment as to the property to be taxed, and the mode of taxation providing that all property similarly situated was treated in the same way.

§ 505. **The Equal Protection of the Laws in Corporate Taxation.**—As the equal protection of the laws allow a legitimate classification in the exercise of the power of taxation as distin-

guished from arbitrary selection, as it has been repeatedly recognized by the Supreme Court, a State is not precluded from taxing, apart from the corporate property, the franchise of organizing and doing business in a corporate capacity. It is for the State to determine how such a tax shall be levied. Such a classification is recognized as not involving double taxation in any sense. Such a corporate franchise tax is in force in many States; and where it is levied without discrimination upon all of the same class, it is consistent with the equal protection of the laws.[1]

The Federal Constitution does not forbid State taxation of the franchise of a domestic corporation at a different rate than is assessed upon its tangible property in the State.[2]

This right to levy a franchise or corporate tax may include in the classification subject to such tax not only domestic corporations of all kinds, but also foreign corporations that are organized under the laws of other States, who do business in the State only through the comity of the State. A State in granting the privilege of doing business as a corporation within its limits can obviously require that the corporation which is admitted shall pay the franchise corporate tax, which is exacted of domestic corporations.[3] The State may go further and exact a further tax from a foreign corporation, though this does not mean that the State can deny any contract rights secured to the corporation by its admission, nor can it impose a tax upon the corporation's rights beyond the jurisdiction of the State.

Thus, a foreign corporation which has paid all the local taxes and has secured a leasehold for a storeroom in a State, was not denied the equal protection of the laws by exaction, under the authority of the Massachusetts statutes, of an excise tax for the privilege of doing business in the State, although it was claimed that domestic corporations were favored by this form of taxa-

[1] There is one exception to this power of the State to tax the corporate privilege, and that is it cannot tax the corporate franchises of Federal corporations, such as national banks. See Sec. 285, *supra*.

[2] Coulter v. L. & N. R. R. Co., 196 U. S. 599, 49 L. Ed. 615 (1905), reversing 131 Fed. 282.

[3] See Ch. V, *supra*.

tion.[1] In this case the excise tax was imposed by taking a percentage of the entire authorized capital of the company, and the court held that this was no objection.

There is no denial of the equal protection of the laws in the taxing of shares of foreign corporations when owned by the inhabitants of the State, although no allowance was made, as in case of domestic corporations where the corporation has property taxed within the State.[2] It seemed that the Indiana statutes taxed all shares in foreign corporations, except national banks, owned by inhabitants of the State, and all shares in domestic corporations, when the property of such corporation was not exempt or was not taxable to the corporation itself. The court said that this was consistent with substantial equality.

§ 506. **Foreign Corporations and "Equal Protection of the Laws."**—The equal protection of the laws is not denied in the imposition by a State of terms and conditions in admitting foreign corporations to do business in its jurisdiction. The State has a right to classify foreign corporations for purposes of taxation as a condition of doing business in the State provided no contract rights are violated and the taxation is equal upon all of the same class.[3]

This power of the State, however, is subject to qualification in the case of interstate carriers as to their right to invoke the equal protection of the laws, where it has been held that the equal protection of the laws may forbid any discrimination between foreign and domestic companies in the imposition of franchise taxes when they are carrying on a precisely similar business. The right to invoke the equal protection of the laws in such case is really based upon the interference with interstate commerce, which is involved in such discrimination.[4]

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[1] Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127 (1913).

[2] Darnell v. Indiana, 226 U. S. 390, 57 L. Ed. 267 (1912), affirming 174 Ind. 143.

[3] Secs. 180, 199, *supra.*

[4] Secs. 254, *supra.*

Subject to this qualification wherein precisely similar conditions prevail in the case of corporations engaged in interstate commerce, the classification of foreign corporations for special taxation imposed as a condition for doing business in the State involves no denial of the equal protection of the laws.

There is, however, a distinction between the power of the State to exclude a foreign corporation not engaged in interstate commerce and to impose special and peculiar taxation upon such corporations upon the condition to do business in the State, and the imposing of such taxation upon such corporations after they have been admitted to the State and have lawfully acquired valuable property interests therein.[1]

The classification of foreign corporations and the levy of a franchise tax as a condition of doing business in the State does not of itself constitute double taxation and involves no denial of the equal protection of the laws, if there is a reasonable and sufficient basis whereon the classification rests.[2]

§ 507. **Foreign Interstate Carriers and the Equal Protection of the Laws.**—Though the power of the State over foreign corporations is not limited in the case of ordinary business corporations by that exercised over domestic corporations of the same class, it is also true that an interstate carrier who comes into the State in compliance with the laws of the State and acquires therein property of a fixed and permanent nature on which it conducts the business of interstate commerce, is a person within the jurisdiction of the State, and, as such, is protected under the equal protection of the laws against discriminating taxation when no such tax is imposed upon domestic corporations of the same class carrying on a precisely similar business.

This was forcibly illustrated in a case from Alabama, where

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[1] *Supra*, Sec. 182.

[2] Ohio Tax Cases, Sec. 254, *supra*. As to the subject of corporate classification, see Home Ins. Co. v. New York, 134 U. S. 594, 33 L. Ed. 1025 (1890); Philadelphia Fire Ins. Co. v. New York, 119 U. S. 110, 30 L. Ed. 342 (1886); Manchester Ins. Co. v. Herriott, 91 Fed. 711 (1899.)

the railway corporation had come into the State in compliance with its laws, and acquired property of a fixed and permanent nature; and the Supreme Court held that the imposition of an additional franchise tax, that is, in addition to the regular property tax, for the privilege of doing business within the State, where no such tax was imposed upon domestic corporations conducting a similar business, was violative of the equal protection of the laws. The court said arbitrary selection could not be justified by calling it classification.

Further referring to the fact that domestic railroad corporations were carrying on the same business, the court said:

"It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule that is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State does violence to the Federal Constitution."[1]

The classification in this case, therefore, failed because it did not include others in similar conditions. Had all corporations, or even all railroad corporations been included in the same

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[1] Southern R. R. Co. v. Green, 216 U. S. 400, 54 L. Ed. 536 (1910), reversing 160 Ala. 396. See also Meyer v. Wells Fargo Co., 223 U. S. 297, 56 L. Ed. 445 (1912), as to law of Oklahoma. Also, as to law of Colorado, see Atch., etc., R. Co. v. O'Connor, 223 U. S. 280, 56 L. Ed. 436 (1912); and also as to law of South Dakota, see Johnson v. Wells Fargo Co., 239 U. S. 234, 60 L. Ed. 62 (1916), affirming 214 Fed. 180. See also *supra*, Sec. 199, and also *infra*, Sec. 510.

classification, it would doubtless have been sustained, as will be seen in the cases cited.

§ 508. **Specification of Railroads is Reasonable Classification for Taxation.**—This principle of classification has been applied to railroads by the Supreme Court in a number of cases, and the power of the States to specify railroads as a class for taxation has been upheld. This was declared in a decision sustaining a statute of Florida,[1] whereby a reassessment of railroads was ordered for certain years in which taxes had not been paid, while no provision was made in regard to reassessment of other property which had been under-assessed during the same period. The court said that taxes are not debts in the ordinary sense of the term.

If the State had deemed it necessary to encourage the building of railroads, it would have had the power to exempt their property; and, conversely, the State might have subjected railroads to taxation while exempting some other classes of property. Since it had this power to classify in the first instance, it had the same power as to property, which in past years had escaped taxation. Classification is a matter of State policy to be determined by the State, and the Federal government is not charged with the duty of supervising the State's action. It might have been found that the railroad delinquent tax was large and that on the other property was small, not worth the trouble of special provision therefor. The court added:

"If taxes are to be regarded as mere debts, then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution."[2]

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[1] Florida Central & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. Ed. 283 (1902), affirming 28 Sou. Rep. 861.

[2] Justice Brown dissented, saying that he did not think that a particular species of property could be arbitrarily taken and subjected to a specific tax for a series of years on the ground that the State

§ 509. **Special Methods of Assessment of Railroad Property Sustained.**—The law-making power determines all questions of discretion or policy in ordering, assessing and collecting taxes, and determining the necessary rules and regulations. The mere fact that a special procedure is provided for the taxation of a certain class of property, different from that provided for another class or from the general procedure in taxation, will not make the act providing such special procedure invalid. These are matters of detail, within the legislative discretion.[1]

The power to classify property for taxation on any reasonable basis includes also the power to provide special methods of assessment for the different classes. Thus a statute of a State assessing railroad property, which requires the company to return the length of the road within and without the State, values the property within as an entirety, and distributes to each county and city along the line its mileage proportion, is valid. The court said,[2] that there was no merit in the objection that the defendants were denied the equal protection of the laws. The Constitution does not forbid the classification of property for the purposes of taxation and the valuation of different classes by different methods. The fact that the legislature had chosen to call a railroad, for the purposes of taxation, real estate, did not identify it with farming lands and town lots in such a sense, as to require the employment of the same methods and machinery of the law to ascertain the value for taxation.

In a later case,[3] the court sustained a statute of the State of Georgia, which enacted a system of taxing railroads, whereby the rolling stock and other unlocated personal property of the railways was distributed for taxation purposes to and for the benefit of the counties traversed by the railroad. The argument was advanced that this was an unjust discrimination, because

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officers had neglected their duty, and added that this kind of discrimination seems to be measured only by the rapacity of the legislature.

[1] Thomas v. Gay, 169 U. S. 283, 42 L. Ed. 740 (1898).

[2] Kentucky Railroad Tax Cases, 115 U. S. 321, *supra.*

[3] Columbus Southern R. Co. v. Wright, 151 U. S. 470, 38 L. Ed. 238 (1894), affirming 89 Ga. 574.

other personal property, both tangible and intangible, was taxed in and by the county where the owner resided. There was in this no violation of the Federal Constitution, the court said, adding, l. c. p. 478:

"This is hardly an open question. Various modes of taxing railroad property are adopted by the different States. In some, railroad companies are taxed upon their property as a unit. In others, the road and the property in each county are separately assessed, and in still others, the whole road is assessed, and then the assessment apportioned among the several counties and towns. These and all similar modes of taxation are subject to the legislative discretion of the respective States, and do not ordinarily present any Federal question whatever. But the mode of distribution of the unlocated or transitory personal property is a matter of regulation by the State legislature, which in no way involves a violation of the Fourteenth Amendment."

The court declared that it was clearly within the province of the legislature of Georgia to give such property a different *situs* for taxation from that of the company's principal office.

The Supreme Court also sustained an act of South Carolina assessing against a railroad its proportion of the salary and expenses of the railroad commissioners of the State, under the provisions of the general railroad law thereof.[1] There was no denial of the equal protection of the laws, although the railroads in addition to this burden imposed upon them alone, were also taxed equally with other property. They received special privileges from the State, their business was affected with a public use, and they were properly charged, in the legislative discretion, with their share of the expenses incurred by the State in connection with their business.

This ruling was reaffirmed in sustaining the Arkansas franchise tax law of 1911.[2] This franchise tax was a specified per-

[1] Charlotte Railroad Co. v. Gibbes, 142 U. S. 386, 35 L. Ed. 1051 (1892).

[2] St. L. & S. W. R. Co. v. Arkansas, *ex rel.*, 235 U. S. 350, 59 L. Ed. 265 (1914), affirming 106 Ark. 321. The court said that the forfeiture clause of the act, in the absence of any State decisions to the con-

centage of the outstanding capital stock of the corporation represented by property owned and used in business transacted in the State. The court said that as long as there was no discrimination in favor of domestic corporations, the classification adopted was not unreasonable and there was no denial of the equal protection of the laws. It was no objection to this tax that the property was subject to the general property tax, as long as there was no discrimination in favor of domestic corporations. The decision in C. C. C. & St. L. v. Backus,[1] did not mean as contended, that because of the Fourteenth Amendment the State may not in addition to the imposition of an ordinary property tax upon an interstate carrier impose a franchise tax ascertained by reference to the property of the corporation within the State, including that employed in interstate commerce. It was permissible, said the court, to value the property and what it was worth in view of its use in interstate commerce, as long as no added burden was imposed as a condition of the use.

§ 510. **Right of Appeal Not Essential to "Equal Protection of the Laws."**—While due process of law requires that there shall be opportunity for hearing at some stage in the valuation of the property,[2] a right of appeal is not necessary, nor is there any denial of the equal protection of the laws because an appeal with a second hearing is permitted to one class of taxpayers while not allowed to another.

Thus it was said by the Supreme Court in the Indiana railroad cases:[3]

"Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the State board, while only the one hearing

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trary, would be held as applicable only to the privilege of doing an intrastate business and also be held as separable from the other provisions of the act.

[1] *Supra*, Sec. 263.

[2] See *supra*, Sec. 343.

[3] See *supra*, Sec. 346.

before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so; and the power of a State to make classifications in judicial or administrative proceedings carries with it the right to make such a classification, as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the Court of Appeals act by Congress, in 1891, a litigant in the Circuit Court, if the amount in dispute was less than $5,000, was given but a single trial and in that court, while if the amount in dispute was over that sum the defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law?"[1]

On the other hand, there is no denial of the equal protection of the laws in the fact that the law gives the assessors in cases of corporations two chances to arrive at the correct valuation of real estate, when they have but one in the case of individuals.[2]

§ 511. Exemption of Producers in License Taxation.—The principle of classification in taxation was applied by the court to an act of Louisiana imposing a license tax of $3,500 on the business of refining sugar and molasses, and exempting planters and farmers refining these products for themselves. The court, sustaining the Supreme Court of Louisiana, held that this discrimination did not violate the Fourteenth Amendment.[3]

It said that on the question whether the sugar company was a manufacturer, within the meaning of the Louisiana constitution, it was bound by the decision of the Louisiana court, but that it might properly consider whether the company was denied the equal protection of the laws.

On the question whether the sugar company was a manu-

[1] 154 U. S., p. 427, *supra*.

[2] New York v. Barker, 179 U. S. 279, 45 L. Ed. 190 (1900), affirming 158 N. Y. 709.

[3] American Sugar Refining Co. Louisiana, 179 U. S. 89, 45 L. Ed. 102 (1900), affirming 51 La. Ann. 563. Justice Harlan concurred in the result.

facturer within the meaning of the Louisiana constitution, the decision of the Louisiana court was conclusive, and on the further question whether there was a violation of the equal protection of the laws, the court said that there was an undoubted discrimination in favor of a certain class of refiners, but it was none the less valid if it rested upon a reasonable distinction upon principle. The court said that a different question might arise, if the act was one exempting planters who used their sugar in other articles of manufacture, while other manufacturers of such articles were subjected to a tax, that is, where none of the articles manufactured were the natural products of the farm. Refined sugar, however, was the natural and ultimate product of the cane, and the various steps taken to perfect the product are but incident to the original growth.

The court said that similar discriminations in Acts of Congress had been sustained, and that the one in question was obviously intended as an encouragement to agriculture and did not deny to persons and corporations engaged in the general refining business the equal protection of the laws.

§ 512. **Classification in Taxation and in Police Legislation Compared.**—In the case last cited the court sustained the right of the State to discriminate in taxation by exempting a certain class of producers, for the reason that the exemption was not pure favoritism, but was based upon legitimate considerations of public policy. The question is thus left open for determination, in every case of classification for taxation, whether the discrimination is arbitrary and oppressive, or natural and reasonable. This decision sustaining the Louisiana tax was strongly urged at the following term in defense of the anti-trust law of Illinois.[1] The court, however, held the law invalid on the ground that agricultural products or live stock in the hands of the producer or raiser were exempted from the operation of the statute, which prohibited the recovery of the price of the article sold by any trust or combination formed in restraint of trade or competition in violation of the act. This discrimina-

[1] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, *supra*.

tion was held to be a denial of the equal protection of the laws; and, answering the argument that the case was controlled by the decision in the case last cited and that of Bell's Gap R. Co. v. Pennsylvania, *supra,* Sec. 504, the court said:

"There was no conflict in the cases. There was a distinction between tax laws and laws enacted in the exercise of the police power. It was one thing to exercise the power of taxation so as to meet the expense of the government, at the same time indirectly building up the protection of particular interests, and quite a different thing to discriminate in the exercise of the police power by declaring that certain classes should be exempt from the general operation of criminal statutes. The court said further that it did not mean to concede that the denial of the equal protection of the laws could never arise under the taxing statutes of the State. On the contrary, the power to tax is so far limited that it cannot be used to destroy rights thereof given or secured by the supreme law of the land. It only meant to say that the constitutional validity of the Illinois statute involved was not necessarily to be determined by the same principle that applied to tax laws."

§ 513. **The Difficulty of Classification.** — The difficulty in drawing the line between reasonable and unreasonable classification is illustrated by two decisions of the Supreme Court, one holding void and the other holding valid under the guaranty of equal protection of the laws legislation of different States concerning the taxation of attorney's fees as costs in certain railroad cases, neither involving a case of taxation proper. In the one case an act of the State of Texas requiring railroad companies in all cases of claims under $50.00 to pay an attorney's fee of not exceeding $10.00 to the successful plaintiff provided the suit was brought 30 days after the refusal of the company to pay the claim.[1]

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[1]Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666 (1897), reversing 87 Tex. 19. Chief Justice Fuller and Justices Gray and White dissenting, saying that costs in civil actions at law are the creature of statute; and that there was a reasonable basis for the classification, as railroads might vexatiously refuse to pay such claims. As to the regret expressed in the opinion that the court was not favored with a brief from the claimant, that is, the plaintiff below,

The court said this was an arbitrary selection and there was no reasonable ground to call it a classification.

In the other case a statute of Kansas providing that in all actions brought for damages caused by fire from the operation of a railroad, the court should allow the plaintiff on recovery a reasonable attorney's fee which should become a part of the judgment.[1] Justice Brewer, who rendered the opinion of the court in the Ellis case, *supra,* also wrote this opinion holding that there was a reasonable basis for this legislation which fact distinguished it from the Texas statute. There was a peculiar danger of fire from the running of a railroad train especially in the prairie State like Kansas, so the classification rested upon a reasonable basis, the court saying:

"Many cases have been before this court, involving the power of State legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power, are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the law which is guaranteed by the Fourteenth Amendment does not forbid classification. That has been asserted in the strongest language."[2]

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the dissent said: "It is hardly surprising that the owner of a claim for fifty dollars only, having been compelled to follow up through all the courts of the State the contest over this ten-dollar fee, should at last have become discouraged and unwilling to undergo the expense of employing counsel to maintain his rights before this court." In Louisiana Liquidation Commissioners v. Marrero, 106 La. 130 (1901), a provision allowing an attorney's fee to the attorney for the tax-gatherer, to be paid by the unsuccessful tax resistant, was held not violative of the equality clause of the Fourteenth Amendment.

[1] Railroad Co. v. Mathews, 174 U. S. 96, 43 L. Ed. 909 (1899), affirming 58 Kan. 447, Justices Harlan, Peckham and McKenna dissenting.

[2] Justice Harlan, with whom concurred Justices Brown, Peckham and McKenna, dissented, saying that the case could not be distin-

§ 514. **Inequality of Burden Does Not Establish Invalidity of Tax.**—The inequality of burden resulting from the enforcement of a tax does not necessarily establish that the tax itself is unequal and a denial of the equal protection of the laws. Thus an act of Pennsylvania allowing banks to collect from their stockholders and pay eight mills upon the dollar of the par value in lieu of all other taxes, instead of being subject to the ordinary rate of four mills upon the actual value of the stock and surplus, was sustained.[1] The Supreme Court said that there was no discrimination and therefore no denial of the equal protection of the laws, as the right of election was offered all banks, State and national, and that a State has the right to exempt certain corporations from all taxation, and the indirect result that other property has to pay a larger per cent does not invalidate the tax on it or give any right to challenge the law, as obnoxious to the provisions of the Federal Constitution. In this case the inequality of the result came from the election of certain taxpayers to avail themselves of privileges offered to all, and the case was therefore analogous to that incidental inequality resulting from taxpayers availing themselves of the discount offered for payment before a specified time. The court quoted approvingly the language of the Supreme Court of Pennsylvania: "the argument is that inequality of burden establishes the unconstitutionality of the law under which the tax

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guished from the Ellis case, and adding at page 111: "I am not astute enough to perceive that the Kansas statute is consistent with the Fourteenth Amendment, if the Texas statute is unconstitutional." He concluded: "In my opinion the statute of Kansas denies to a litigant upon whom no duty has been imposed by statute and whose liability for wrongs done by it depends upon general principles of law applicable to all alike, that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws." In Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 47 L. Ed. 204 (1902), the Texas statute authorizing a recovery of damages and attorney's fees for failure of life and health insurance companies to pay losses was held not repugnant to the equal protection of the laws.

[1]Merchants' Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236 (1897), affirming 168 Pa. 309.

is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand."

§ 515. **Equality and Uniformity in Inheritance Taxation.**— The relation of the Federal guaranty of equal protection of the laws to the requirement of uniformity and equality in the State constitutions is illustrated in the decisions of the Supreme Court and some of the State Supreme courts relating to the classification allowable in inheritance taxation.

In the courts of Ohio,[1] Missouri,[2] and Minnesota,[3] classifications and exemptions based upon the value of the estate or the inheritance, were held to violate constitutional requirements of equality and uniformity in taxation.

In the *Ohio* case, the Supreme Court (of the State) said that a progressive rate of taxation, according to the values of the estate, was in conflict with the provision of the Ohio constitution, that government was instituted for the equal benefit and protection of the people. It was said that the scope of the provision for equal protection of the laws under the Fourteenth Amendment was not broader than the State Bill of Rights, and that a statute authorized by the latter would not be in conflict with the Constitution of the United States.

In *Missouri* the court said that the mere calling of a tax in a statute a succession tax did not make it such, when in fact in its effect and operation it was a property tax, as it was levied upon the whole estate of the decedent, and as a property tax the graduated progressive rates violated the constitutional requirement of uniformity in the same class of subjects.

In *Minnesota* a probate tax, graduated according to the value of the estate, violated, according to the State court, two provisions of the State constitution, one guaranteeing "justice freely and without purchase, promptly and without delay,"

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[1] State *ex rel.* Schwartz v. Ferris, 53 Ohio St. 314, and 30 L. R. A. 218 (1895).

[2] State *ex rel.* v. Switzler, 143 Mo. 287 (1898).

[3] State v. Gorman, 40 Minn. 232 (1889). See also State v. Mann, 76 Wis. 469 (1890).

and the other providing that "all taxes are to be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the State."

The Supreme Court of *New Hampshire* went further,[1] and held that the exemption of husband, wife, children and grandchildren was violative of the rule in the constitution of the State requiring proportional and reasonable taxes. This ruling has not been followed in other States; and it is held that classification in inheritance taxation, based wholly upon the degree of relationship, so that the tax is levied at a uniform rate upon those bearing the same relationship to the testator, is reasonable and open to no constitutional objection. In the language of the Supreme Court of Massachusetts, such a classification has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater.[2] But a discrimination between residents and non-residents of the State, by imposing an inheritance tax upon certain collaterals when non-residents of the State, has been held an illegal classification.[3]

§ 516. **"Equal Protection of the Laws" in Inheritance Taxation.**—The Supreme Court, however, affirming the judgment of the Supreme Court of Illinois,[4] sustained, as valid under the

[1] Curry v. Spencer, 61 N. H. 624 (1882).

[2] Minot v. Winthrop, 162 Mass. 113 (1894), one judge dissenting on the ground that the exemption of estates not exceeding $10,000 in value was unreasonable; State v. Alston, 94 Tenn. 674 (1895); State v. Hamlin, 86 Me. 495 and 25 L. R. A. 632 (1894); Thyson v. State, 28 Md. 577 (1868); Eyre v. Jacob, 14 Grattan (Va.) 422 (1858); Billings v. People, 189 Ill. 472 (1901); State v. Henderson, 160 Mo. 190 (1901); Gellsthorpe v. Fernell, 20 Mont. 299 (1897).

[3] *In re* Mahoney's Estate, 133 Cal. 180 (1901). The decision was based on the ground that the discrimination was in violation of Article IV, Section 2, of the Constitution of the United States, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and also violative of Sec. 1977, R. S. of U. S., *supra*, Sec. 332.

[4] Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 42 L. Ed. 1037 (1898), affirming 167 Ill. 122.

Fourteenth Amendment, the inheritance tax of that State, which was levied at discriminating progressive rates graduated according both to the degrees of relationship and to the amounts inherited. The court said that, as to the equal protection of the laws, what affords this equality has not been and probably never can be precisely defined; and, after citing former opinions of the court, that it does not prohibit legislation which is limited either in the objects to which it is directed or by the territory in which it is to operate, continued at page 293:

"It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. Hayes v. Missouri, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said, that the rule prescribed no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. . . .

"The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. . . .

"In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. 'Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.' . . .

"There is, therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so; in a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

In reference to the cases from the State courts, above cited, it was said, l. c. p. 292:

"They are authority against the Illinois statute. But it is not necessary to dwell on the points of agreement of the cases. Our inquiry must be not what will satisfy the provision of the State constitutions, but what will satisfy the rule of the Federal Constitution. The power of the State over successions may be as plenary in the abstract as appellee contends for. Nevertheless, it must be exerted within the limits of that constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

Applying these principles to the statute, it was held that the classification of the Illinois law was within the power of the legislature to make and was reasonable; and that the State had the power to regulate successions. It was true that the amount of the exemption (estates under $20,000 were not taxed) was greater in the Illinois law than in any other, but this was a matter depending upon the judgment of the legislature in each State and could not be subjected to judicial review. The court followed the Illinois court in holding that the tax was imposed on the succession, which is to be regarded as "new property"[1] of the legatee or distributee.

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[1] Justice Brewer dissented from the opinion, so far as it sustained that part of the law which graded the rate of the tax upon legacies to strangers by the amount of such legacies, saying, l. c. p. 301: "If this were a question in political economy, I should not dissent, but it is one of constitutional limitations. Equality in right, in protection and in burden is the thought which has run through the life of this nation and its constitutional enactments from the Declaration of Independence to the present hour." Again, at p. 302: "It seems to be conceded that if this were a tax upon property, such increase in the rate of taxation could not be sustained, but, being a tax upon the succession, it is held that a different rule prevails;" and concluded: "But whatever may be the power of the legislature, Illinois had regulated the matter of descents and distributions and had granted the right of testamentary disposition. And now by this statute upon property passing in accordance with its statutes a tax is imposed; a tax unequal because not proportioned to the amount of the estate; unequal because based upon a classification purely arbitrary, to-wit, that of

§ 517. **The Supreme Court on Inheritance Taxation and Equal Protection of the Laws.**—The Supreme Court has uniformly sustained the right of a State to make exemptions and discriminations based on relationship and on the amounts involved in the inheritance tax laws of the State. Thus, it was held that the Illinois law which excluded foreign corporations from the exemption in favor of property devised for educational or religious uses, did not abridge privileges or immunities of citizens of the United States or deny the equal protection of the laws;[1] nor was there any denial of the equal protection of the laws in the provision of the inheritance tax law of New York of 1887, where a tax was imposed upon certain bequests of personalty by a non-resident decedent owning both real and personal property in the State, because under the statute, as construed by the State court, a tax could not be collected if the only property belonging to the decedent, situated in the State, was personalty;[2] nor was the equal protection of the law denied in the case of the California law, which subjected brothers and sisters to an inheritance tax, but did not impose any tax on strangers to the blood, such as the wife or widow of a son or the husband of a daughter.[3] The court said that in this case they had no concern with the motives of public policy which may induce a State to prefer new relatives by affinity to collateral relatives.

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wealth—a tax directly and intentionally made unequal. I think the Constitution of the United States forbids such inequality."

After the decision in the Magoun case, the Supreme Court of Pennsylvania, *In re* Estate of Cope, 191 Pa. 1, and 45 L. R. A. 316 (1899), held the inheritance tax of that State, which exempted $5,000 from the two per cent inheritance tax on all personal property passing by will, etc., after deducting debts, was in violation of the constitution requiring all taxes to be uniform upon the same class of subjects, and prohibiting exemptions. The court in this opinion quotes approvingly the dissenting opinion of Justice Brewer in the Magoun case.

[1] Board of Education v. Illinois, 203 U. S. 553, 51 L. Ed. 314 (1906), affirming 216 Ill. 23.

[2] Beers v. Glynn, 211 U. S. 477, 53 L. Ed. 290 (1909), affirming 186 N. Y. 449.

[3] Campbell v. State of California, 200 U. S. 87, 50 L. Ed. 382 (1906), affirming 143 Cal. 627.

Neither is there any merit, the court held, in the distinction sought to be made between an inheritance tax and one on transfers *inter vivos*. The court said that the privilege of acquiring property by such deed was as much dependent upon the law as acquiring property by inheritance, and that transfers by deed, to take effect at death, had frequently been classed with death, duties, legacies, and inheritance taxes. The court said that the State had not only the right to tax such transfers, but it had the right to fix the rate, and state when and how the amount should be ascertained and paid. The fact that the liability was imposed when the transfer was made, and that payment was not required until the death of the grantor, did not present any Federal question, and there was no denial of the equal protection of the laws.[1]

Neither was there any denial of the equal protection of the laws under the Louisiana Inheritance Tax Law of June, 1904, whereunder successions which had been finally closed and administered upon were exempted, where the highest State court had made the validity of the tax depend upon this classification by deciding that the State can tax the property until it has passed out of the succession of the testator.[2] The court said:

"It was certainly not an improper classification to make the tax depend upon a fact without which it would have been invalid. In other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who can not be legally taxed are not taxed."

§ 518. **Classification by Amount in License Taxation.**—The Supreme Court[3] in a later case extended the application of this principle of classification by amount to license taxation upon business, and affirmed the constitutionality of a city ordinance imposing a license tax upon merchants. Under this ordinance per-

[1] Keaney v. New York, 222 U. S. 525, 56 L. Ed. 299 (1912), affirming 194 N. Y. 281.

[2] Cahen v. Brewster, 203 U. S. 543, 51 L. Ed. 310 (1906), affirming 115 La. 377.

[3] Clark v. Titusville, 184 U. S. 329, 46 L. Ed. 569 (1902).

sons in different occupations paid different amounts, and persons in some occupations were classified by the maximum and minimum amount of sales. It was urged in this case that the decision in Magoun v. The Bank was not controlling, as that involved only the State power over inheritances. But the court said that it was decided in that case that the inequality between the members of the different classes did not constitute a case of discrimination under the Fourteenth Amendment, that the same principle controlled the case at bar, and that the equality between the members of the same class was sufficient to satisfy the Fourteenth Amendment. It was contended that the tax was really a tax on property, as the final incidence of the tax was on the merchant. But the court replied that "every tax had its final incidence on some individual," and that "that principle could not be urged to destroy well recognized distinctions." The tax was on the privilege of doing business and regulated by the amount of sales, and was not repugnant to the Constitution of the United States.

§ 519. **Property Taxation and Inheritance Taxation Distinguished.**—The principle of classification by amount thus enforced in the case of inheritance taxation, and extended to license taxation, has not been applied to the case of property taxation. The right to be secure in the possession of property when once acquired is admittedly distinct from the right to inherit property, although it must be conceded that the taxation of a business is in effect and incidence a tax upon the property employed in the business. It was argued in the Magoun case that an inheritance tax is not on property, but on the succession, and that the right to take property by devise or descent is a creature of the law, not a natural right, but a privilege. The authority, therefore, which confers it may impose conditions upon the privilege thus granted. It was argued on the one side that the State could exercise its power to the extent of making itself the heir of everyone, and on the other that there was a natural right in the children to inherit. The court did not distinctly pass upon these propositions, but based its decision upon the right of the State to make reasonable clas-

sifications in taxation. Justice Brewer remarked in his dissenting opinion that it seemed to be conceded that, if the tax was one upon property, the progressive increase of the rate could not be sustained.

The expressions in the opinions of the Supreme Court, already referred to, concerning the large discretion of the States in the exercise of the taxing power, to vary the rates or forms of taxation, clearly refer to discretion in the adjustment of taxation, so as to better approximate the equal distribution of the public burdens. To avoid disturbing this adjustment, the court has sustained the exercise of the State's discretion and has been reluctant to disturb State classification in inheritance and license taxation. The court has also reiterated in these recent opinions the words of Mr. Justice Bradley, in the Bell Gap Railroad case, that "clear and hostile discriminations of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition."[1]

The considerations which would justify and even require graded classifications in taxation through business licenses, such as were sustained in Clark v. Titusville, do not exist in ordinary property taxation. The proportional burden of fixed charges for the privilege of conducting business diminishes as the volume of business increases, and a business tax, which would be trifling in a large business, would be an intolerable burden in a small one. Graded classification, therefore, which would be in accord with usual practice in inheritance or license taxation, would, in property taxation, be "of an unusual character" and "unknown to the practice of our government."

§ 520. **Classification by Exemption.**—The right of specializing and classifying for taxation obviously includes the right to make reasonable exemptions from taxation. Thus property may be exempted from considerations of public policy, for example, that held for religious, educational and charitable uses,

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[1] Bell's Gap Railroad Co. v. Pennsylvania, *supra*, Sec. 504. Upon this subject of discriminating taxation as violative of the Fourteenth Amendment, see Guthrie's Lectures on the Fourteenth Amendment, page 120 *et seq.*

and that which is of so little value in proportion to the amount of the tax to be secured, that it would not justify the expense of assessment and collection. Certain exemptions of this character are customary in systems of taxation, and to these the court refers in the Bell's Gap Railroad case, *supra,* Sec. 504. In many States the right of exemption is controlled by the State constitutions, which in some cases limit, and in other cases distinctly prohibit, legislative exemptions. In the absence of such constitutional restrictions, the right of the State to make exemptions, or contracts for exemption, when it deems them expedient according to its own public policy, has been sustained by the Supreme Court.

In the taxation of occupations, the selection of those which are taxed involves the exemption of others which are not; but it is obvious that the discretion of the taxing power, in the matter of its selection, cannot be reviewed. Because the State taxes some occupations, it need not tax all; but if it taxes any occupation, it must tax all engaged therein, and it cannot make an arbitrary classification of occupations to be taxed.[1]

In other words, reasonable classification is required in making exemptions from taxation. The right to classify here, as in any other form, must be distinguished from arbitrary discrimination. If the limit of exemptions, $20,000, fixed in the Illinois inheritance tax laws sustained by the Supreme Court in the Magoun case, *supra,* Sec. 516, should be applied in property taxation, it would exempt, in most communities, all but a very few taxpayers, and since such an exemption could only proceed from a purpose to shift the entire burden of government upon a few, it would be a clear violation of the equality of right guaranteed by the Federal Constitution.

This distinction was illustrated in the United States Circuit Court in North Dakota, where it was held, in an opinion by Judge Caldwell, that it was not competent for the State, either under the organic act whereunder it was admitted to the Union, or the Fourteenth Amendment, to classify the lands in the Territory for the purposes of taxation into those owned by the

[1] See Department Store case, *infra,* Sec. 525.

railroad companies and those owned by all other persons, and declare that the former should not and the latter should be taxed. The prohibition in the organic act against making "any discrimination in taxing different kinds of property" necessarily implies a prohibition against any discrimination in taxing the same kind of property. The court said: "It establishes the just and reasonable rule, which is becoming fundamental in our American system of taxation, that the burdens of taxation shall fall equally upon all owners of the same kind of property."[1] In this case, a corporation claimed its lands were exempt, in other words, claimed a discrimination in its own favor against individuals; but the equality of right enforced by the constitution applies to all persons, corporate and individual, within the jurisdiction of the State.

But the State may classify railroads for taxation, and apply to them a special method of assessment, *e. g.*, according to their gross earnings,[2] as it may exempt them from taxation altogether, if it deems wise; that is, if it determines that the benefit to be derived from such exemption is equivalent to the tax that would otherwise be exacted, and that the property exempted is used for the promotion of the public welfare.[3] This determination, subject to the restriction of the State constitution, is a legislative and not a judicial question.

§ 521. **Exemption for Efficiency in Taxation.**—An interesting illustration of the necessity of apparent discriminations, in adjusting a taxing system to modern conditions, is presented in a Maryland case. A statute of that State subjected to tax-

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[1] Northern Pac. R. R. Co. v. Walker, 47 Fed. 681 (1891). The exemption was held violative of the Fourteenth Amendment, as well as of the organic act of the Territory.

[2] Northern Pac. R. R. Co. v. Barnes, 2 N. D. 310 (1892).

[3] See Norhern Pac. R. R. Co. v. Garland, 5 Mont. 146 (1884). It was held, in South Dakota, *In re* Assessment, 4 S. D. 6 (1893), that under the State constitution requiring uniformity and equality in taxation, an act permitting the deduction of debts from the amount of credits and personal property, while making no deduction from the value of real estate, was invalid, and also invalid in that it prohibited deductions of debts within the State, but not of debts without the State.

ation bonds of a corporation held by residents and secured by mortgage upon property wholly within its jurisdiction, but exempted mortgages by individuals and building associations, and the non-interest bearing bonds of corporations. It was held by the highest court of the State[1] that these were not arbitrary discriminations, but valid under the constitution of the State and under the Fourteenth Amendment. The State was not obliged to tax every form of property. An individual's true wealth, for the purposes of taxation, consists of his real and personal property, but, in the case of a corporation, its franchises, its borrowing power, its earning power, its real wealth, are not represented merely by its visible property and shares of stock. Its taxable value is its bonded indebtedness together with its stock.[2] There was reason, therefore, for the exemption. The exemption of non-interest bearing bonds was not arbitrary, but based upon sound reasoning, as the true test of a taxable value is the producing value to the owner. The court held that these are discriminations which the best interests of society require, within the principle laid down by the Supreme Court in the Bell's Gap Railroad case.[3]

§ 522. **Exemption of Certain Michigan Telephone Companies Valid.**—The State of Michigan levied tax on telephone companies, exempting the companies whose gross receipts did not exceed $500, and it was contended that the act offended against the equal protection clause of the constitution. This was not a tax on the occupation, but on property. The court said that this exemption was not an arbitrary discrimination, but was based on the fact that the use of the smaller lines was merely private, and but a trifling part of the whole. While the basis, that of amount of earnings, might not have been exact,

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[1] Simpson v. Hopkins, 82 Md. 478 (1896).

[2] Citing Mr. Justice Miller in the Illinois railroad tax cases, *supra*, Sec. 260.

[3] The report of this case is interesting as showing the relation of law to economics on this subject, as briefs of counsel cite such economic authorities as Professor Seligman and David A. Wells.

the court adopted the view of the District Court that the exemption was not invalid.[1]

§ 523. **Conditions Which Warrant Classification.**—The conditions of which the courts take notice as warranting classification for taxation are illustrated in a Pennsylvania case,[2] where it was held by the Supreme Court of that State that a constitutional requirement of uniformity upon the same class of subjects was not violated by a statute which made all interest-bearing indebtedness of private corporations a separate class for the purposes of taxation, and required assessment upon their nominal value, while all mortgages and money paid by solvent debtors, etc., were taxable at a certain rate upon their value. The court said this classification was justified by the peculiar nature of corporate securities, the great fluctuations in their value and the difficulty of reaching them by a general system of taxation. Classification should be made according to some reasonable practical rule drawn from experience which would prevent a gross inequality in the burdens of taxation. Absolute equality is, of course, unattainable; a mere approximate equality is all that can reasonably be expected. The mere diversity in the methods of assessment and collection, however, if these methods are provided by general law, violates no rule of right, if when these methods are applied the results are practically uniform. If there is a substantial uniformity, however different the procedure, there is a compliance with the constitutional provision; even when there may be some disparity of results, if uniformity is the purpose of the legislature, there is a substantial compliance.

Classification for taxation is not necessarily based upon any essential difference in the nature or condition of the various subjects. It may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods so

[1] Citizens Telephone Co. v. Fuller, 229 U. S. 322, 57 L. Ed. 1206 (1913), affirming 185 Fed. 634.

[2] Commonwealth of Pennsylvania v. Delaware Division Canal Co., 123 Pa. 594, 2 L. R. A. 798 (1889).

as to produce just and uniform results, or it may be based upon just and well grounded considerations of public policy.

§ 524. **Constitutional Amendment Held Unconstitutional.** —While classification may thus be based upon differences in the nature or condition of the subjects of taxation, or their want of adaptability to the same methods of taxation, it must rest on some other reason than that of mere ownership. Thus it was held in Missouri, in a notable case, that while property owned and used by a railroad company in its equipment as a common carrier can probably be separately classed for taxation, a discrimination excepting all property of every description owned by any *quasi* public corporation and resting upon no other reason than that of mere ownership is a discrimination violative of the Fourteenth Amendment.[1] The case is an interesting one, as it involved the decision that a constitutional amendment adopted in that State for the taxation of mortgages was invalid. The amendment was substantially copied from the California constitution and was adopted at the general election in November, 1900. It provided that a mortgage should be taxable as an interest in the property affected thereby, "except as to railroads and other *quasi* public corporations for which provision has already been made by law."

This method of taxing mortgages had been held not violative of the Constitution of the United States in Savings Society v. Multnomah County, a case from Washington.[2] The exception of railroads and other *quasi* public corporations from the provisions of the act was held by Justices Field and Sawyer in the United States Circuit Court, in the case of the Southern Pacific Company,[3] to be an unlawful discrimination, but it was suggested by Mr. Justice Field, in his opinion, that the constitutional provision of California could be sustained by eliminating the exception. The judgment in this case invalidating the assessment complained of was affirmed by the Supreme Court[4]

[1] Russell v. Croy, 164 Mo. 69 (1901) opinion by Valliant, J., three judges dissenting.

[2] *Supra*, Sec. 458.

[3] *Supra*, Sec. 332 *et seq.*

[4] 118 U. S. 394, 30 L. Ed. 118 (1886).

on another ground, and the point in question has never been decided by that court, although it has upheld, as stated, the power of the States to tax mortgages as real estate.

The Missouri court said that the discrimination in excepting railroad and other *quasi* public corporations was not in accord with the uniformity and equality in taxation required by the State constitution, but that, of course, that was no legal objection to its validity as a constitutional amendment, "as the very purpose of the amendment is to make some change in the original." But it was also violative of the equal protection of the laws secured by the Fourteenth Amendment of the Federal Constitution.

It was admitted that the State could classify property for taxation, but it was said that the classification must rest on some reason other than mere ownership, and that different pieces of property of the same kind held or used for the same purposes within the same jurisdiction could not lawfully be so classified, as that one is subject to the tax and the other exempt, merely because one belongs to a natural person and the other to a corporation, or that one is the obligation of a corporation and the other that of a natural person, or one that of a large concern and the other that of a small one. The words of the exception were applicable to all mortgaged property of every class owned by railroads or other *quasi* public corporations, and the discrimination put mortgage securities issued by these corporations in a position of advantage over such securities made by individuals, so that the money lender could afford to lend his money to a *quasi* public corporation at a less rate of interest than to others. The court also cited and quoted from the opinion of the United States Circuit Court in the Northern Pacific Railroad case, and the opinion of Mr. Justice Field in the Southern Pacific Railroad case, also from Mr. Guthrie on the Fourteenth Amendment, as follows:[1]

"Indeed, in one of the early cases, the extreme statement was made that 'the Federal Constitution imposes no restraints on

[1] Pp. 117, 118.

the States' in regard to unequal taxation.[1] If this language means that the amendment does not prohibit legitimate classification, and that it does not require all kinds of property to be taxed at the same rate, the statement is correct. Certain kinds of property and certain classes of persons can be singled out for taxation, even though this may result in exempting other property and other classes from any tax burden. But the statement is too broad, and is misleading. Unequal taxes may not be imposed upon property of the same kind, in the same condition and used for the same purposes. 'Equality is of the very essence of the taxing power itself.' The Fourteenth Amendment does impose a practical and effective restraint against such taxes.''

The constitutional amendment was therefore declared void,[2] as violative of the Fourteenth Amendment.

§ 525. **Department Store Tax Held Unconstitutional.**—Another decision of the Supreme Court of Missouri declared invalid another example of illegitimate classification for taxation,[3] known as the Department Store Tax case. This act imposed a license of not less than $300 nor more than $500 for each of the classes or groups of goods sold by each merchant employing more than fifteen persons. It was declared invalid on other grounds, but also because it was unwarranted class legislation violative of the natural rights of the citizen. The court based its decision principally upon the provisions of the Missouri Bill of Rights, that all persons have a natural right to life, liberty and the enjoyment of the gains of their industry, and that no person shall be deprived of life, liberty or property without due process of law, and said that the classification in the act was wholly without reason or necessity, and was truly ''classification run wild.'' . . .

''To have made the act apply to all merchants of a given avoirdupois or to those employing clerks of a designated stat-

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[1] Justice Miller in Davidson v. New Orleans, *supra*, Sec. 397.

[2] For decision of the United States Circuit Court of Oregon in relation to the same system of taxing mortgages, see Dundee Mortgage & Trust Co. v. Parrish, 24 Fed. 197 (1885).

[3] State *ex rel.* v. Ashbrook, 154 Mo. 375 (1900).

ure, or to those doing business in buildings of a special architectural design, would have been as natural and as reasonable a classification for the purpose in view, as the classification made by this act."

§ 526. **Taxation of Employers of Foreign Born Persons Held Invalid.**—Both the Supreme Court of Pennsylvania and the United States Circuit Court in that State held invalid an act of its legislature, imposing on employers of foreign-born unnaturalized male persons over twenty-one years of age a tax of three cents a day for each day that each of such persons should be employed, and authorizing the deduction of that sum from their wages. It was held by both tribunals that this act deprived the employes of the equal protection of the laws, in violation of the Fourteenth Amendment.[1] The U. S. court said, and its language was quoted by the State court:

"It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis for taxation, which is lacking here. The tax is of an unusual character and is directed against and confined to a particular class of persons. Evidently the act is intended to hinder the employment of foreign-born, unnaturalized persons over twenty-one years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocation obstacles to which others in like circumstances are not subjected. It imposes upon those persons burdens, which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. The equal protection of the laws declared by the Fourteenth Amendment to the Constitution, secures to each person within the jurisdiction of a State exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances."

The Supreme Court of Pennsylvania held that the act was not only violative of the Federal Constitution, but also of the State constitution, which provided that all taxes should be uniform upon the same class of subjects.

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[1] Fraser v. McConway, 82 Fed. 257 (1897); Juniata Limestone Co. v. Fagley, 187 Pa. St. 193, 42 L. R. A. 442 (1898).

§ 527. **Discriminations Between Residents and Non-residents.**—Any form of discrimination in taxation in favor of residents and against non-residents is void, not only on the ground already considered,[1] that such discrimination is an interference with interstate commerce and violates the privileges and immunities of citizens of other States,[2] but on the further ground that such classification in taxation is unreasonable and violative of equality and uniformity, and of the equal protection of the laws.

In a Vermont case,[3] this principle was applied to a discrimination in favor of non-residents, that is, of goods not manufactured in the State.

The statute which imposed a tax upon peddlers selling goods, which were the manufacture of the State, was held to effect a discrimination in favor of foreign goods and to be therefore a denial to persons "within its jurisdiction of the equal protection of the laws." The court said that the question was one of classification, and that it must appear in every such case that the classification is based on some reasonable ground, some difference which bears a just and proper relation to the attempted classification and not a mere arbitrary selection.[4] Applying this rule, there was no sufficient ground in this case.

"It cannot be based an any difference in the goods themselves, for they are precisely alike; nor on the fact that they were made in different States, for that bears no just and proper relation to a classification, but is purely arbitrary. It cannot be based on public policy; for it is not reasonable to say that it is for our interest to encourage the introduction

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[1] *Supra*, Ch. IV.

[2] See Beeson v. Johns, 124 U. S. 56, 31 L. Ed. 360 (1888). The discrimination in this case was claimed to violate the ordinance of 1787, and the act of admission of Iowa into the Union. The court held that the evidence did not show any discrimination against non-residents as such.

[3] State v. Hoyt, 71 Vt. 59 (1898).

[4] It was held in Cribbs v. Benedict, 64 Ark. 555 (1897), that the difference in manner of enforcement of a ditch tax, between residents and non-residents, the tax being the same in amount and a lien on the land in both cases, was not an unreasonable discrimination.

and sale of the goods of the non-resident manufacturer, when thereby the manufacturer and sale of the goods of the resident manufacturer would be discouraged, and perhaps prevented altogether. Nor can it be based on the difference of residence of the manufacturers; for that, as in case of the goods, would be purely arbitrary, and, besides, would allow a State to discriminate against its own citizens in favor of the citizens of other States, which it cannot do any more than it can discriminate in favor of its own citizens against the citizens of other States, for the equality clause of said amendment includes everybody. No State shall 'deny to any person within its jurisdiction the equal protection of the laws' is its language, and its universality of inclusion has been often adjudged. Yick Wo v. Hopkins, 118 U. S. 356, 369. If a classification can be based on none of these grounds, we see no ground on which it can be based."[1]

§ 528. **Illegal Discrimination in License Taxation.**—While the State may classify for the purposes of license taxation, that is, taxation upon business or occupations, and may thus tax one business without taxing another, it cannot make a classification which is arbitrary and has no just and reasonable basis. This was illustrated in the Department Store case, *supra*, Sec. 525. Where a license tax is imposed upon those of a cer-

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[1] In Gilman v. Sheboygan, 2 Black 510, 17 L. Ed. 305 (1863), the court followed the Supreme Court of Wisconsin, holding that under the constitution of that State a tax upon "all the real estate" of the city for the payment of a railroad subscription was an illegal discrimination, there being some three or four hundred thousand dollars of personal property in the city subject to taxation.

For other illustrations of classifications adjudged illegal, see State v. Hubbard, 12 Ohio Circ. Dec. 87 (1901), holding that taxation of teachers as a class of citizens, for the purpose of raising a Teachers' Pension Fund, was void. An act dividing the counties of the State into classes and the lands thereof into sub-classes according to quality, fixing a maximum and minimum value for taxation of the lands in the several classes, and confining the assessor to the limits so fixed, was held violative of uniformity and equality in taxation. Hawkins v. Mangum, 78 Miss. 97 (1900). Also State v. Benzenberg, 101 Wis. 172 (1898); State v. Gardner (Ohio), 51 N. E. 136 (1898); Walsh v. Denver, 11 Colo. App. 523 (1898); State v. Willingham (Wyo.), 62 Pac. Rep. 797, 9 Wyo. 290 (1900).

tain business, it must be levied without discrimination upon all engaged therein, within the jurisdiction of the authority levying the tax. This is essential in order that the tax may be equal and uniform as required by the State constitutions, as well as under the provision for equal protection of the laws. In the language of the Supreme Court in the Illinois inheritance tax case, *supra*, Sec. 517, the rule (of the Fourteenth Amendment) is not a substitute for municipal law; it only prescribes that the law have the attribute of equality of operation, and the equality of operation does not mean indiscriminate operation on persons as such, but on persons according to their relations. In some circumstances it cannot tax A more than B, but if A be of a different trade or profession than B, it may.

In North Carolina a license of a thousand dollars charged upon the occupation of an emigrant agent, unaccompanied by any police regulation, was held void as violative of the principle of uniformity, which, under the constitution of that State, prohibited any discriminating tax upon persons pursuing the same vocation. The decision was based upon the ground that there was no regulation prescribed in the act, and that it was an arbitrary and unreasonable exercise of the taxing power.[1]

Reasonable classifications for taxation, however, such as between wholesale and retail merchants,[2] between manufacturing and *quasi* public corporations and other corporations,[3] between gas companies and other manufacturing companies,[4] have been sustained, as also, in numerous cases, have license charges upon all those engaged in a certain business. But, on the other hand, discriminations between members of the same natural class have been uniformly condemned. Thus discriminations between commission merchants and produce dealers,[5] in license taxation

[1] North Carolina v. Moore, 113 N. C. 697, and 22 L. R. A. 472 (1893). The act also lacked uniformity in that it expressly excluded from its operation all counties lying west of a certain line.

[2] Commonwealth v. Clark, 195 Pa. St. 634 (1900).

[3] Carroll v. Alsup (Tenn.), 64 S. W. Rep. 193 (1901). See also Commonwealth v. Edgerton Coal Co., 164 Pa. St. 284 (1894).

[4] Williams v. Reese, 2 Fed. 882 (1880).

[5] Kansas City v. Grush, 151 Mo. 128 (1899).

according to the residence of a party,[1] and between merchants doing business in different parts of a city, have been held void as violative of the principle of uniformity and equality, as between members of the same natural class. A poll tax, exempting persons who had voted at the last election, was held an unreasonable classification and void.[3] A peddler's license tax, exempting persons who had served in the army or navy, was also held void.[4]

But the Fourteenth Amendment, while securing to all persons in the pursuit of a lawful business the equal protection of the laws, is not to be construed as restricting the State in the exercise of its power to charge its citizens with the burdens of taxation, differing in their imposition according to the manner in which the vocation of the citizen touches and concerns the public interests. Thus, in New York, a license fee upon the entire class of persons acting within the State as agents for associations of individual fire underwriters not incorporated under the laws of the State, while the agents of domestic fire insurance corporations were not subject thereto, was held not to involve the unequal application of a tax.[5]

The regulation of the liquor traffic, or of any other calling or business which is of such a nature that it may fairly be deemed to be subject to police prohibition or regulation, obviously rests on different grounds, and the same State law may authorize both regulation and taxation.[6]

Thus the statute of Texas, requiring a license and bond and the payment of an occupation tax as conditions of the right to sell liquors, was sustained by the Supreme Court, although

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1 St. Louis v. Consolidated Coal Co., 113 Mo. 83 (1892).

2 St. Louis v. Spiegel, 75 Mo. 145 (1881); St. Louis v. Spiegel, 90 Mo. 587 (1886).

3 Kansas City v. Whipple, 136 Mo. 475 (1896).

4 State v. Garbrouski, 111 Iowa 496 (1900).

5 Fire Department of New York City v. Stanton, 159 N. Y. 225 (1899); see also State v. French, 17 Mont. 54 (1895); Hayes v. Commonwealth, 55 S. W. Rep. 425 (1900); Kinsley v. Cottrell, 196 Pa. St. 614 (1900); Singer Manufacturing Co. v. Wright, 33 Fed. 121 (1887).

6 Gundling v. Chicago, *supra*, Sec. 473.

there was no such requirement as to any other occupation.[1] The court said the statute affected all persons in Texas engaged in the sale of liquors, exacted compliance in the same manner and to the same degree, and did not therefore violate the Fourteenth Amendment.[2]

§ 529. **Street Railroads and Equal Protection of the Laws.**—The exemption of the sub-surface street railway in New York city from the operation of the special franchise tax law of New York of 1899 did not make that statute invalid as to the owners of the surface street railway;[3] nor was a street railroad denied the equal protection of the laws by a municipal tax on its business at the rate of $100 per mile or fraction of a mile in said streets, because a steam railway making an extra charge for local deliveries of freight brought over its road from outside of the State is not subject to this tax.[4]

§ 530. **The Supreme Court on Classifications in License or Occupation Taxation.**—Although the equal protection of the laws is invoked in substantially all cases where due process of law is denied in State taxation, particularly in the case of license or occupation taxes, the Supreme Court has all but uniformly sustained the State authority. Thus, it was held that wholesale dealers in oil are not denied the equal protection of the laws by the Texas occupation tax, although no similar tax is exacted from wholesale dealers on other articles of merchandise, such as sugar, bacon, coal, and iron;[5] nor was the requirement of a stamp tax for places where corporate stocks and bonds, and grain, and provisions, and other commodities are

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[1] Giozza v. Tiernan, 148, U. S. 657, 37 L. Ed. 599 (1893).

[2] See also Humes v. Ft. Smith, 93 Fed. 857 (Ark.) (1899); Daniels v. State, 150 Ind. 348 (1898); Strouse v. Galesburg, 89 Ill. App. 504 (1900); *In re* Eberly, 98 Fed. 295 (1899).

[3] New York *ex rel.* v. State Board Tax Commission, 199 U. S. 1, 50 L. Ed. 65 (1905), affirming 174 N. Y. 417.

[4] Savannah Ry. Co. v. Savannah, 198 U. S. 392, 49 L. Ed. 1097 (1905), affirming 115 Ga. 137.

[5] Southwestern Coal Co. v. Texas, 217 U. S. 114, 54 L. Ed. 688 (1910), affirming 100 Tex. 647.

bought and sold, but not paid for at the time, make the statute invalid as denying the equal protection of the laws under the Missouri Act of March, 1907;[1] nor was an occupation tax imposed upon the business of compounding, rectifying, adulterating, and blending distilled spirits by the Kentucky Act of March 28, 1906, invalid as denying the equal protection of the laws, because no such tax was exacted from either resident or non-resident distillers who neither rectify, compound, adulterate, or blend their products, nor from rectifiers and blenders of other States or countries who vend in the States, untaxed, rectified or blended spirits, in direct competition with the spirits of local rectifiers or blenders;[2] nor did the exemption of steam laundries and women engaged in a laundry business where more than two women were employed, from the license tax of Montana, Code 2776, upon the laundry business, deny the equal protection of the laws to men operating a hand laundry.[3]

In this case it was suggested that this exemption involved a discrimination against Chinamen; and the court said that that question was not properly before it, as the action was one brought to recover $10 paid under duress and protest for a license to do hand laundry work, and it was without prejudice to that question when it should be raised; and the court affirmed the judgment.

Nor was the equal protection of the laws denied in any of the following cases:

To a retail dealer by the Iowa tax imposed on cigarette selling, because sales by jobbers and wholesalers, in doing interstate business with customers outside of the State, were excepted.[4]

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[1] Broadnak v. Missouri, 219 U. S. 284 (1910), 55 L. Ed. 219, affirming 228 Mo. 25.

[2] Brown-Forman Company v. Kentucky, 217 U. S. 563, 54 L. Ed. 883 (1910), affirming 125 Ky. 402.

[3] Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. Ed. 350 (1912), affirming 39 Mont. 64.

[4] Cook v. Marshall County, 196 U. S. 261, 49 L. Ed. 471 (1905), affirming 119 Ia. 384.

Nor liquor sellers, because producers and manufacturers of domestic wines are excepted by the Texas law, while such wines were in their hands.[1]

Nor to a domestic agent of a non-resident packing house under the Georgia License Law.[2]

Nor members of an incorporated chamber of commerce, because of the exemption by the laws of Minnesota of other organizations, such as the Associated Press, fraternal orders, etc.[3]

§ 531. Discrimination in Expenditure of Public Funds.— The equal protection of the laws under the Fourteenth Amendment prohibits unjust discrimination not only in taxation, but also in the expenditure of the proceeds of taxation. It is obvious, however, that a very clear case must be presented, to justify the judiciary in interfering with the very large discretion which is reposed in the legislative department in expending, under the limitations of the State constitution, the public funds for the public needs.

This principle was applied by the United States Circuit Court in Kentucky, in granting an injunction against a Board of Trustees of Public Schools, in behalf of certain colored citizens, on the ground of discrimination in the distribution of school funds.[4] The act of the legislature authorized the municipality to levy a tax for the benefit of the public schools within its limits, but directed that the taxes collected from the white people should be used to sustain the schools for white children only, and that those collected from the colored people should go to support the schools for the colored children. The effect of this discrimination was to give to the whites excellent school facilities and a school session annually of nine months, and to the colored children inferior school facilities and an annual ses-

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[1] Cox v. Texas, 202 U. S. 440, 50 L. Ed. 1019 (1906), affirming 95 S. W. (Tex.) 734.

[2] Cairo v. Stewart, 197 U. S. 60, 49 L. Ed. 663, affirming 117 Ga. 919.

[3] Rogers v. County of Hennepin, *supra*.

[4] Claybrook v. City of Owensboro, 16 Fed. 297.

sion of only three months. The court said that this was a discrimination under State authority constituting a denial of the equal protection of the laws. In answer to the argument that the equal *protection* does not mean the equal *benefit* of the laws, the court said that on that basis the State could apply taxes not only according to color, but also according to the nativity of citizens, and that a division might be made limiting the benefit and distributing the protection of the laws according to the taxes paid and the wealth of the taxpayer. This would entirely ignore the spirit of our republican institutions. The court added at page 302:

"The equal protection of the laws guarantied by this amendment must and can only mean that the laws of the States must be equal in their benefit as well as equal in their burdens, and that less would not be the equal protection of the laws. This does not mean absolute equality in distributing the benefits of taxation. This is impracticable; but it does mean the distribution of the benefits upon some fair and equal classification or basis."

The court quoted the language of the Supreme Court of California:[1]

" 'To declare, then, that each person within the jurisdiction of the State shall enjoy the equal protection of its laws, is necessarily to declare that the measure of legal right within the State shall be equal and uniform, and the same for all persons found therein, according to the respective conditions of each—each child as to all other children, each adult person as to all other adult persons.' "

On final hearing of this case,[2] it was held that the court had no power to issue a mandatory injunction, requiring the distribution of the money raised by taxation for public schools regardless of the discriminations prescribed by the act, and could only enjoin persons from acting under authority of the act.

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[1] In Ward v. Flood, 48 Cal. 51 (1874).

[2] 23 Fed. 634 (1884).

§ 532. **Equal Protection of the Laws in Tax Procedure.**—The right of classification recognized in the guaranty of the equal protection of the laws is also applied to tax procedure when it is claimed that statutes of procedure do not apply equally to all the lands in the State. The fact that in its application a statute can only meet conditions such as are embraced in the law as to a part of the counties in the State does not render it obnoxious to the Fourteenth Amendment. It is sufficient that the law applies with equal force to all that are brought within its terms.[1]

§ 533. **Discrimination Between Races in Expenditure of School Funds.**—The same question came before the Supreme Court of the United States in another case presenting a materially different question. The Board of Education in Richmond County, Georgia, suspended the high school for negroes, but continued to maintain one for white children. Suit was brought to compel the closing of the high school for the whites, on the ground that its maintenance when the other was closed was a discrimination against the colored race in violation of the rights secured to them under the Fourteenth Amendment. The constitution of Georgia provided for free and separate schools. The State court did not deem the action of the board in suspending temporarily and for economic reasons the high school for the colored children a sufficient reason for closing that for the whites, and said there was no evidence that the board had acted in bad faith, or that it had abused its discretion.[2] The Supreme Court said that under the circumstances it could not

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[1] See Kentucky Union Company v. Kentucky, Sec. 365, *supra.*

[2] Cumming v. Board of Education, 175 U. S. 538, 44 L. Ed. 262 (1899), affirming 103 Ga. 641. Held, by the New York Ct. of App., 93 N. Y. 438, People *ex rel.* v. Gallagher, that separate public schools being provided for colored children, such children may be excluded from those provided for white children, and that this involved no denial of rights under the Fourteenth Amendment. Attention was called to the fact that Congress had established exclusive schools for the education of the colored race in the District of Columbia. The amendment was not intended to have any other effect than to give to

see that this action of the State court was, within the meaning of the Fourteenth Amendment, a denial of the equal protection of the laws to plaintiffs; adding that "while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in the schools maintained by State taxation is a matter belonging to the respective States, and any interference on the part of the Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

It seems that in this case the board had not established a high school for white boys, but only for white girls. The court said that the colored school children of the county would not be advanced in the matter of their education by a decree compelling the board to cease giving support to the white high school, that its decision was in the interest of the greater number of the colored children who attended the primary schools, and that the small number wanting a high school education could obtain it in the existing private institutions at an expense not beyond that incurred in the high school discontinued by the board.

In a Kansas case,[1] an act providing for the levy of a fire tax which excluded the property of railroad companies, whereon the tax was levied, from the benefit and protection of the proceeds thereof, was held invalid, the court saying:

"As some of the taxpayers appear to have been purposely excluded from the benefit and protection of the law, the tax, therefore, lacks that equality and uniformity essential to its

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all, without respect to color, age or sex, the same legal rights and the uniform protection of the same laws.

Held, in North Carolina, Markham v. Manning, 96 N. C. 132 (1887), that a law which directed that the funds raised by taxation from the property of whites should be devoted to the schools of white children, and those raised from the property of negroes should be devoted to schools for negroes, was unconstitutional and void. See United States v. Buntin, 10 Fed. 730, and cases cited in note.

[1] A. T. & S. F. R. Co. v. Clark, 60 Kan. 826 (1899).

validity. It is a discrimination against one taxpayer in favor of another, and is a denial of the equal protection of the law required by both State and Federal constitutions. Absolute equality in taxation is, of course, unattainable, but a law, the manifest purpose and legitimate result of which is discrimination and inequality, cannot be sustained."

§ 534. **Federal and State Guaranties of Equal Taxation.**— The Fourteenth Amendment in this guaranty of the equal protection of the laws confers no right, except that of invoking the Federal power against illegal discriminations under State authority. Equal protection of the laws as construed by the Supreme Court does not require an iron rule of equality in taxation, but does require that uniformity and equality as to the same class of subjects by due apportionment which are inherent in taxation, as distinguished from arbitrary exaction. A State has the right to determine according to its own considerations of public policy what subjects shall be taxed and what reasonable classification shall be made in distributing the burdens of taxation, provided that the classification is natural and reasonable and not arbitrary and oppressive. What is natural and reasonable on the one hand, or arbitrary and oppressive on the other, must be determined from the circumstances of each case, as from the nature of things no definite rule can be formulated.

It will be seen, however, from the opinions of the Supreme Court and the several State courts in which the question has been discussed, that the latter tribunals have been disposed to give a stricter construction to State constitutional provisions requiring equality and uniformity in taxation than the Supreme Court has given to this clause of the Fourteenth Amendment as a restraint upon the State power of taxation. Thus, in the matter of inheritance taxation, the Supreme Court held valid, under the Fourteenth Amendment, a progressive tax which had been held invalid in certain State courts as violative of equality and uniformity in their respective constitutions.

It is doubtless true, however, that the very existence of this Federal guaranty, conservative as the Supreme Court has been

in its enforcement, is a protection against the discriminating exercise of the taxing power.[1]

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[1] The subject of classification was thoroughly considered in Indiana, State *ex rel.* v. Smith, 158 Ind. 543 (1902), where the court, two judges dissenting, sustained, as a valid classification under the State constitution requiring a uniform rate of taxation, and also under the Fourteenth Amendment, an act allowing deduction from the assessed value of real estate of mortgage indebtedness to the amount of $700, no deduction being allowed greater than one-half of the assessed value of the real estate.

The writ of error from the Supreme Court in this case was dismissed, 191 U. S. 138, 48 L. Ed. 125 (1903), the court holding that a county auditor did not have such a personal interest entitling him to a writ of error, as a personal, and not an official, interest was necessary.

CHAPTER XVI.

EQUAL PROTECTION OF THE LAWS IN THE VALUATION OF PROPERTY.

§ 535. Inequality in taxation through inequality of valuation.
536. Inequality of valuation from error of judgment.
537. Inequality through unequal local assessments.
538. Fraudulent valuation in assessments.
539. Discrimination by undervaluation of other property.
540. Dilemma of courts in remedying unequal valuations.
541. Habitual and intentional violation of assessor's duty must be proved.
542. Relief against discriminating assessments in State courts.
543. Equality of valuation enforced in Federal courts.
544. Judge Taft on dilemma of courts.
545. Formal resolution not necessary for intentional discrimination.
546. Supreme Court condemns inequality of valuation.
547. Illegality of unequal valuation reaffirmed—Jurisdiction of equity.
548. Inequality of valuation as Federal question.
549. Proof of discrimination by cross-examination of State Board of Equalization members.
550. Systematic discrimination by undervaluation of other property illegal.
551. The proof of unlawful discrimination.
552. Full valuation enforced by creditors of counties and municipalities.

§ 535. **Inequality in Taxation Through Inequality of Valuation.**—The Federal guaranty of equal protection of the laws has been invoked to remedy another form of discrimination, growing out of habitual and intentional inequality in the *valuation* of property for taxation. It is obvious that, where taxation is upon property that requires valuation, inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax. This was declared by the Supreme Court in construing the Act of Congress providing that State taxation upon the shares of the national banks should not

be at a greater rate than is assessed on other moneyed capital.[1] The court said that Congress had in mind an assessment, a rate of assessment, and valuation, and taking all these together the taxation on these shares was not to be greater than on other moneyed capital. Congress, therefore, in prohibiting discrimination in taxation against national banks, prohibited discriminations in the valuation of bank shares. The principle thus applied in enforcing equality in the taxation of national bank shares has been applied to discriminations in the taxation of other property, effected through inequality of valuation producing inequality in taxation under the same rate of taxation. This discriminating inequality, when habitual and intentional, has been declared violative of both the equality and uniformity guaranteed by State constitutions, and also of the equal protection of the laws guaranteed by the Federal Constitution.

It is obviously immaterial what the basis of valuation is, if it is uniform as to all property within the territory or as to the class of subjects upon which the tax is laid. This is recognized in the requirement of some State constitutions, that taxation shall be uniform upon the same class of subjects within the territorial limits of the authority imposing it. Thus, if all the property in the State were valued on the same basis, it would be immaterial to the individual taxpayer whether he paid one per cent on a valuation of one hundred cents, or two per cent on a valuation of fifty cents, or four per cent on a valuation of twenty-five cents. If there were no general property tax levied by the State, based upon valuation, it would make no difference whether property in one town or county was valued on a higher basis than property in another. But within the territory wherein the tax is levied, as in the State at large wherein the State tax upon property is levied throughout its jurisdiction, inequality of taxation results as certainly from inequality of valuation as from inequality in the tax rate. The failure to recognize this fundamental principle in taxation often makes it misleading to compare for illustration the taxing rates of different States or communities, as it is impossible to com-

[1] *Supra*, Sec. 312.

pare the burden of taxation in different communities, unless we have both the essential factors of the problem, the rate of the valuation and the rate of the tax.[1]

§ 536. **Inequality of Valuation from Error of Judgment.**— This inequality of valuation may exist when the design on the part of the assessors is honest, and there is no intentional discrimination. There are inevitable inequalities in valuation growing out of the errors and infirmities of human judgment. The Supreme Court has said that "perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream."[2]

The influences which affect the salable values of property are variable and often complicated. Thus it has been said[3] that the differences between assessors on questions of valuation of the same class of property are no greater than frequently arise between witnesses in a trial on questions of value. There is no certain, definite standard of values, excepting of money and standard marketable articles. Many influences, tangible and intangible, affect the salable value of property, real and personal, both in city and country, so as to make its real valuation a work of great difficulty and resulting in inevitable inequalities. It is for the purpose, therefore, of remedying as far as practicable these inevitable inequalities growing out of the honest but mistaken judgment of assessors, that special tribunals are provided for the equalization of values, and as a rule inequalities not involving intentional discrimination can only be remedied in such tribunals.[4]

§ 537. **Inequality Through Unequal Local Assessments.**— These inevitable and, as a rule, irremediable inequalities in tax-

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[1] For illustrations in State taxing systems of taking a fixed per cent of the value returned as a basis of assessment, see State systems of Alabama, Illinois, Iowa, Nebraska and Minnesota, *infra*, appendix.

[2] Justice Miller in the Head Money Cases, 112 U. S. 580, l. c. 595, 28 L. Ed. 798 (1884).

[3] *Supra*, Sec. 312.

[4] In some States, as in New York, inequalities in values may be reviewed by the courts on writ of *certiorari*.

ation are in many cases grossly aggravated by intentional lowering or raising of the rate of valuation by local assessments in response to local needs or local public opinion. In many States the maximum tax rate of municipalities or counties is limited by the constitution or statutes, so that a higher rate of valuation is enforced in order to raise the revenues for municipal or local expenses, while, in counties where there is no such need for revenue, valuations are made at a lower rate; so that the State tax is levied upon property in cities at a higher rate of valuation than it is upon other property in the State, thus making an inequality of taxation as between different parts of the State.[1]

Many of the States have sought to remedy these inequalities, growing out of the action of local assessors influenced by local considerations, through boards of equalization vested with power to equalize these local valuations as to the different classes of property. Another remedy has been urged and adopted in some States, in the separation of the sources of municipal and State revenue. Where such separation is made and no State tax is levied upon the property, the inequality in valuation between the local subdivisions becomes immaterial, as the other subdivisions are not affected thereby.[2]

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[1] In some States county assessors are reported to have been elected on the platform of lowering the county assessments.

[2] The experience of Missouri in this regard is interesting, as it is fairly typical of other States in this matter. From a careful investigation made a few years since, it was found that the rate of assessments varied in the State from 20% to 80% of the full value, the average assessment of farm lands being about 35%. In St. Louis, real estate was assessed at 70%, while money and securities, when discovered by the assessor (mainly in the Probate Court), were assessed at 100%. The only effectual equalizing by the State Board of Equalization was in the case of banks and trust companies, which had been locally assessed in the different cities and counties all the way from 38% to 100%, and the State Board fixed an equalized value at 50%. The equalizing of general property valuations was not attempted. See writer's "Taxation in Missouri," Ch. XVI. A State tax commission was created in 1917 to grapple with the problem.

§ 538. **Fraudulent Valuation in Assessments.** — Assessors act in a semi-judicial capacity, and, as a rule, their judgments are only reviewable in special tribunals established by the State for that purpose, so far as errors of judgment in valuation are concerned. These, like all judgments, may be vacated for fraud in direct proceedings, but the fraud must be clearly established.[1] Accordingly, an invidious assessment, made unequal and oppressive through intentional unfairness of valuation, will be set aside. Thus, the Supreme Court of Michigan, in an opinion by Judge Cooley, held that a bill was not demurrable, which alleged that an assessment was fraudulently made above the real value of the property and relatively much above other property. Later,[2] the same court applied this principle to a case where a fraudulent undervaluation of certain property was alleged which resulted in the increase of plaintiff's assessment, and the court held that the plaintiff was entitled to a reduction to the extent that his assessment was increased by reason of such fraudulent valuation. It said:

"We cannot agree with the authorities cited by defendant to sustain the position that a wilful or intentional violation of the law, by the omission of property from assessment or its deliberate undervaluation, must be treated the same in equity, as regards the assessment and valuation of property for taxation, as an accidental omission or an honest mistake in judgment because the result is the same in both cases. Fraud is ever open to remedy in a court of equity, and there can exist no good reason why relief against fraud in taxation, which in the end deprives a man of his property without due process of law, cannot be granted as well as against any other fraud."[3]

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[1] Merrill v. Humphrey, 24 Mich. 170 (1871).

[2] Walsh v. King, 74 Mich. 350 (1889).

[3] See also Pacific Postal Telegraph Cable Co. v. Dalton, 119 Cal. 604 (1898), holding that a taxpayer may enjoin the collection of a tax founded upon assessments fraudulently and corruptly made with intention of discriminating against him, and for the purpose of causing him to pay more than his just share of taxes, but not for mere error in judgment. See also Hersey v. Supervisors, 16 Wis. 185 (1862), where an intentional omission was held to avoid an assessment.

§ 539. **Discrimination by Undervaluation of Other Property.**—The proof of such fraudulent undervaluation, which would warrant a court in setting aside an assessment, is rarely obtainable. The real difficulty, which is widely prevalent, arises not from discrimination by intentional overvaluation, that is, by valuing property at more than the true value, but by the undervaluation of other property. This may not be fraudulent in the sense that it proceeds from a corrupt motive on the part of the assessor, but it is intentional, and, when it is habitual, as it often is, it operates as an effective discrimination. This discrimination may be effected, although the property of the party discriminated against may also be valued at less than its true value, through the greater undervaluation of other property. It is the relative valuation of property which constitutes discrimination. Thus, if the property of one taxpayer or class of taxpayers is valued at eighty per cent of the full value, while all other property subject to the same tax is valued at forty per cent, there is as clear and effective a discrimination as if the assessment of the former had been above the true value and all other assessments at the true value.

§ 540. **Dilemma of Courts in Remedying Unequal Valuation.**—The courts of some of the States have found a difficulty in remedying this form of discrimination in taxation, as such remedy would involve the judicial recognition of the practice of undervaluing property in violation of the constitutional or statutory requirement, that all property should be assessed at its full or cash value. This requirement is differently phrased in the constitutions or statutes as "full value," "cash value," or "fair cash value." Not only is it presumed that assessors perform their official duty and do not violate their official oaths, but these courts have found it difficult to relieve disproportionate taxation by directing a reassessment or a reduction of an assessment below the "full value" directed by the constitution or statute of the State.

Thus it was said by the Supreme Court of *Massachusetts*:[1]

[1] Lowell v. Co. Commissioners, 152 Mass. 375 (1890).

"Whatever may be the remedy, if there be any, when it is shown that the assessors have intentionally assessed the property of a part or all of the inhabitants at less than its fair cash value, we are of opinion that, in a petition for the abatement of taxes on the ground of the overvaluation of the property of the petitioner, and the disproportionate taxation arising from such overvaluation, the question is, whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons."[1]

Also in *New Jersey*,[2] where it was claimed that the State Board had assessed corporate property at its "true value" and local assessors had assessed other property "at much below its true value," the court said that the argument that the State Board should be compelled to pursue the same forbidden course had no force whatever.

In an *Ohio* case,[3] the court said that a gross, if not scandalous, inequality existed between the burdens of taxation cast upon bank shares and those imposed upon other property in the county. But it said that the blame attached to the officers of the law and not to the law itself, and that, to reduce plaintiff's assessment from eighty per cent, its value fixed by the assessor, to the forty per cent at which other property was valued, would put an additional wrong upon the other counties of the State where property was presumably valued for State purposes at the full value prescribed by the statute.[4]

§ 541. **Habitual and Intentional Violation of Assessor's Duty Must be Proved.**—The presumption, on which these decisions of the State courts are based, that assessors sworn to

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[1] This was the case of a manufacturing company, and it was held that the evidence of what other manufacturing property was valued at was admissible only as a possible assistance in determining the cash value of the property in question, as that and not the proportionate value was in issue.

[2] Central Railroad Company v. Assessors, 48 N. J. L. 1 (1886).

[3] Wagoner v. Loomis, 37 Ohio St. 571 (1881).

[4] This case is an interesting illustration of the injustice and effectual inequality enforced through the presumption that officers of the law do their duty, when it is notorious that they do not.

assess property at its true value or true cash value perform their official duty, has been recognized and applied by the Supreme Court, where discriminations through undervaluations of other property were claimed as a denial of the equal protection of the laws under the Fourteenth Amendment. That court has therefore held that such undervaluation cannot be presumed, but must be distinctly alleged and proved. In this case the New York Court of Appeals said[1] that, while it was generally understood that in many localities throughout the States assessors, in violation of their duties, valued real estate at less than its actual value, the court could not assume without proof that there had been such undervaluation in the city of New York, which was the place where the assessment was complained of. In the Supreme Court,[2] reliance was placed upon the expressions in the opinion in Cummings v. National Bank[3] as to the notoriety of the practice of undervaluation by assessors. But the court said that in that case the bill alleged the fact of undervaluation and the testimony supported the allegation, and added:

"Although the justice who wrote the opinion did speak of the fact as matter of common observation, neither he nor the court took judicial notice thereof, but only those facts which had been pleaded and testimony to sustain which had been duly given formed the basis of judicial action. We will not and ought not to presume a violation in the absence of allegations and proofs to that effect."

The court said that there was no allegation in the petition for *certiorari* that the laws of the State provided for an undervaluation of property, either with regard to individuals or corporations, but on the contrary it was therein asserted that the assessed valuation of the real estate was its actual value, and the whole force of the plaintiff's contention was based upon the fact of undervaluation, although it was in the teeth of the stat-

[1] People *ex rel.* v. Barker, 146 N. Y. 304 (1895).

[2] New York State v. Barker, 179 U. S. 279, 45 L. Ed. 190 (1900), affirming 158 N. Y. 709.

[3] 101 U. S. 153, *supra.*

ute and in plain violation of its provisions. In order to raise the question of the denial of equal protection of the laws, it was obviously necessary, the court said, to allege and prove that there was habitual violation of the law by undervaluation; that the assessors habitually and intentionally, or by some rule prescribed by themselves or by someone whom they were bound to obey, undervalued real estate by assessment in New York city, and that such rule had been applied, not solely to one individual, but to a large class of individuals or corporations. The court said, further, that this was the effect of the ruling in the National Bank cases, where the court had enforced the Act of Congress prohibiting discrimination against national bank shares. Whether the facts assumed by counsel, as to the undervaluation of real estate held by individuals as compared with corporate property, would amount to such a discrimination against corporations as to work a denial of the equal protection of the laws, was a question not raised by the record and not necessary to be decided.[1]

§ 542. **Relief Against Discriminating Assessments in State Courts.**—Equality in taxation, that is, equality as to the same class of subjects upon which the tax is levied, both in the tax rate and in the valuation of property, is not only guaranteed by the provisions of many State constitutions, but is inherent in taxation as distinguished from arbitrary exaction. Equality in this sense, therefore, as already shown, is equivalent to the equal protection of the laws under the Fourteenth Amendment. When cases of discrimination in assessments through undervaluations are presented to the State courts, they are confronted

[1] This presumption that assessors perform their duty was applied in Missouri, where it was held, State *ex rel.* v. Western Union Tel. Co., 165 Mo. 502 (1901), that the testimony of one member of the State Board of Equalization, that, in his judgment, the valuation put upon property generally was only 35 to 40 per cent of its true value, was insufficient to overcome the presumption that the officers did their duty in assessing property at its true value in money as required by the statute. This testimony was held insufficient to convict the local assessors of systematic and intentional violation of duty. See also, as to proof of undervaluation, Sec. 547 *et seq.*, *infra.*

with the dilemma whether they should give effect to the paramount intent inherent in taxation, whether specifically declared in the State constitution or not, that taxes shall be equally levied, or whether they should disregard that intent and deny relief, because of the statutory requirement that all property shall be assessed at its cash value.

The Federal and many State courts have taken the former course and granted relief where the complainant's property was assessed at less than the true value, but at a higher rate than other property in the same jurisdiction. Thus, in Connecticut,[1] where there was no direct constitutional requirement of equal taxation, the statute required that property should be assessed at its full market value. Plaintiff's property was so assessed, contrary, however, as was shown, to the practice of the assessing board, which regularly assessed property at one-half of its market value. The complainant was declared entitled to an assessment according to the uniform rule, in the face of the mandatory provision of the statute that all property should be assessed at its true market value, the court saying:

"There are two ways in which a taxpayer may be wronged in levying taxes: An assessment may conform to the statute generally, and the individual may be assessed in excess of the statutory requirement. A wrong of that description is easily redressed. But when the town disregards the statute, and establishes a rule of its own, assessing the property at one-half of its actual value, and then assesses an individual at the full value of the property, while the injury is the same, the application of the remedy becomes more complicated. Practically, the only way to redress the wrong is to reduce the assessment, and that makes the court seem to disregard the statute, while, if the wrong is not redressed, there is a denial of justice, and the court practically ignores the statute giving an aggrieved party an appeal, and practically ignores the statute which provides that 'said court shall have power to grant such relief as shall to justice and equity appertain.' Thus we are in a dilemma. If we choose one horn of it, a public statute is violated, not so much by the court as by the town, but by an ap-

[1] Randell v. City of Bridgeport, 63 Conn. 321 (1893).

parent approval of the court as to one individual, and that by an express command of another statute, and by the dictates of justice. If we take the other horn, the court itself violates a remedial statute, and becomes in a measure a party to the wrong-doing. Under the circumstances, we do not hesitate to choose the former, and to redress the wrong."[1]

In *Arkansas*,[2] the assessment of a bridge was reduced to fifty per cent of its actual value because this appeared to be the regular rate of valuation assessed upon all realty in the county, although the statute on the subject provided that property should be assessed at its "true market value in money." The court said:

"It may be said that, inasmuch as its property was not assessed above its true value, it had no right to complain. But this is not true. It had the right to demand that no unequal burden be imposed upon it by taxation. The duty to contribute to the support of the State government by the payment of taxes is imposed upon all persons owning property subject to taxation. The constitution provides that this burden shall be apportioned among them according to the value of their property, to be ascertained as directed by law. When, therefore, the property of a few is taxed according to its value, and of all others at one-half its value, then the few are required to contribute double their portion of the burden. This is manifestly a wrong, and justice demands that it be redressed whenever it can be done conformably to the laws.

In *Illinois* the statute directed that each parcel of property should be valued at its true value in money. In a case where it appeared[3] that the valuation of the property of individuals ranged from one-fifth to one-third, while that of the railroad companies ranged from one-third to one-half, the court held that the assessment of the railroad property must be at the same percentage of the real value as that of individuals, and said:

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[1] See also, to the same effect, Cocheco Co. v. Stratford, 51 N. H. 455. (1871.)

[2] *Ex parte* Bridge Co., 62 Ark. 461 (1896).

[3] Board of Supervisors v. Railroad Co., 44 Ill. 229 (1867).

"The rule adopted by the assessors in this State has grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. . . . Would not the sense of justice of every man in this community be outraged by allowing this or any other depreciation to one class of people, and demanding of another a higher tax on a similar article of the same actual value? The proposition cannot commend itself to the favor of any just man, and can receive no countenance in a court of justice."

In *Kansas* the constitution of the State required that the legislature should provide for a uniform and equal rate of assessment for taxation, while by the terms of the statute all property must be assessed at its true value. The court held[1] that the assessment of railroad property at its true value, while the property of individuals and other corporations was assessed at twenty-five per cent of its true value, was not uniform and equal taxation, and that plaintiff, having tendered its just share of taxes, was entitled to enjoin the collection of the illegal excess.

§ 543. **Equality of Valuation Enforced in Federal Courts.** —These rulings of the State courts last cited, that effect must be given to the paramount purpose of equality in taxation, in disregard of the statutory directions that property must be assessed at its full value, have been followed in several notable cases in the Federal courts.

The United States Circuit Court of Appeals for the Eighth Circuit followed the decision of the Supreme Court of Kansas, and, reversing the United States Circuit Court, directed a decree of injunction against the enforcement of a tax on the full value of the plaintiff's property, assessed by the State Board of Assessors of a county, pursuant to agreement among themselves, while other property in the county was assessed at only one-third of its value.[2]

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[1] C., B. & Q. R. R. Co. v. Board of Commissioners, 54 Kan. 781 (1895).

[2] C., B. & Q. R. R. Co. v. Commissioners of Republic County, 67 Fed. 411, 14 C. C. A. 456, and 32 U. S. App. 224 (1895).

Reference has already been made to the opinion of Mr. Justice Field in the California Railroad case,[1] wherein was first announced the application of the Fourteenth Amendment to discriminating taxation. In holding that the deduction of a mortgage from the valuation of real estate in other cases and denying such deduction in the case of a railroad was necessarily a discrimination, the court said:

"The basis of all *ad valorem* taxation is necessarily the assessment of the property; that is, the estimate of its value. Whatever affects the value necessarily increases or diminishes the tax proportionately. If, therefore, any element which is taken into consideration in the valuation of the property of one party be omitted in the valuation of the property of another, a discrimination is made against the one and in favor of the other, which destroys the uniformity so essential to all just and equal taxation."[2]

An opinion by Judge Taft in the United States Circuit Court of Appeals for the Seventh Circuit,[3] contains a thorough review of the authorities and is a valuable contribution on this question to our jurisprudence. It was established by the evidence that other property in the State of Tennessee than that of railroad companies was habitually and intentionally assessed at not exceeding seventy-five per cent of its real value. The actual value of the railroad and telegraph lines as compared with that of other property would make the share of the former in the payment of taxes a little less than one-eighth of the whole. The actual assessment of railroad and telegraph property placed upon them an additional burden, so as to make their share of the total taxation one-sixth instead of one-eighth. The constitution of the State not only directed that taxes should be "equal and uniform" throughout its jurisdiction, but specifically required that "no one species of property from which a tax might be collected should be taxed higher than any other

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[1] *Supra*, Sec. 333.

[2] 18 Fed. 385 (1883).

[3] Taylor v. L. & N. R. R. Co., 31 C. C. A. 537, and 88 Fed. 350 (1898), affirming 85 Fed. 302, and 86 Fed. 168.

of the same value;" and the statute of the State required that all property should be assessed at its full value.[1]

§ 544. **Judge Taft on Dilemma of Courts.**—Upon the question presented whether the court should enforce equality in disregard of the statute or refuse to remedy inequality by following the statute, the court said that the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and others in the same class was a flagrant violation of the constitution of the State forbidding discrimination in taxation between different species of property. In answer to the suggestion that the only remedy consistent with the constitution was by raising the assessments of other property, the court said that this was no remedy at all, as it would involve raising the total tax assessment of the State in each of the counties, and the absolute futility of such a course and the enormous expense and length of time necessary needed no comment. The court added:

"To enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise is to make the restrictions of the constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. The same

[1] Judge Taft said in his opinion that Judge Lurton and he were inclined to think that any legislative system of tax assessment of property based on a uniform percentage of its value would be "according to its value," and would be a compliance with the constitutional mandate. The third judge, Severance, doubted on this subject, but it was said the difference was not material, as they were of the unanimous opinion that the question was not controlling.

dilemma has been presented to other courts. They have not always taken the same horn."

The Supreme Court has adopted the same "horn" of the dilemma as Judge Taft.[1] It was said in the latter opinion that the principle declared in the Cummings case, in regard to discrimination in the valuation of national banks,[2] applies as well in the assessment of other classes of property, and that there was nothing in subsequent decisions of the Supreme Court distinguishing between habitual and sporadic decisions that changed the effect of this case. Occasional and accidental discriminations were inevitable in every assessment, but are not likely to continue because they are not the result of any illegal purpose on the part of anyone. The interposition of a court of equity is only justified when there is an obvious violation of law, or something equivalent to fraud. As to the remedy, the court said that the entire assessment on all classes of property was to be regarded as one judgment. The effect of an intentional and, therefore, fraudulent violation of the law by uniformly undervaluing certain classes of property while assessing other classes at their full value, though a literal compliance with the law, made the whole assessment, considered as one judgment, a fraud upon the fully assessed property. In view, however, of the inconvenience to the public in the delay incident to a new assessment, the injunction would extend only to so much of the tax as was based upon the excessive assessment; and the injunction therefore required that the complainant, as a condition to the issue, should pay to the proper officers a tax on seventy-five per cent of the assessment made by the defendants.

The opinion, in this case, does not discuss or invoke the guaranty of the equal protection of the laws under the Fourteenth Amendment, but is based upon general constitutional principles of taxation expounded by the State courts in the cases cited. Jurisdiction in the case was based upon adverse citizenship.[3]

[1] See Secs. 546, 547, *infra*.

[2] See *supra*, 312.

[3] The decision in the United States Circuit Court, by Judge Clark, is based directly upon the violation of the equal protection of the

§ 545. **Formal Resolution Not Necessary for Intentional Discrimination.**—While the courts presume that assessors perform their duty, and habitual and intentional discrimination must not only be alleged but proved, it does not follow that this intention of assessors to discriminate should be proved by formal resolution to that effect. This was ruled in the case of discrimination against the shareholders in national banks.[1] Thus, in the United States Circuit Court of Oregon, where it was claimed that the lands in certain counties were assessed at one-third of their value, while the mortgages of plaintiff were assessed at the nominal value of the debts, that is, at the full value,[2] the court said that it was not necessary to make the assessment illegal that there should be an actual conspiracy or express design on the part of the assessors to disregard the law, adding:

"Whenever the assessor of a district of a country as large as one of these counties uniformly estimates real property at only one-third of the value he places on mortgages, it is impossible to attribute the result to the infirmity of human judgment, and the only conclusion possible in the premises is that it was deliberately and wilfully done in pursuance of a settled purpose or rule on his part; and where the same thing occurs in a number of counties in various parts of the State it is manifest that the action of the assessor is not only wilful and deliberate, but that it is the result of general and well-understood custom to substitute this conventional value of real property for 'the true cash' one which the statute requires."[3]

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laws under the Fourteenth Amendment, 86 Fed. 168 (1898). See also Trustees of the Cincinnati Southern R. R. Co. v. Guenther, Trustee, 19 Fed. 395 (1884).

[1] See Sec. 316, *supra*.

[2] Dundee Mortgage & Inv. Co. v. Parrish, 24 Fed. 197 (1885); see also California & Oregon Land Co. v. Gowan, 48 Fed. 771 (1892).

[3] The court said in its opinion that the practice was so universal and well known in Oregon that the court could take judicial notice of it and safely assume that there was not an acre of land in Oregon valued for taxation at more than one-half of its true value. Generally it was not valued at more than one-third of its value. As personal property, especially money, is more liable to escape taxation than land, therefore, in a country governed largely by landowners, like

§ 546. **The Supreme Court Condemns Inequalities of Valuation.**—In two notable cases the Supreme Court has definitely determined that intentional discrimination growing out of systematic undervaluation of other taxable property of the same class constitutes a denial of the equal protection of the laws, entitling the party thus discriminated against to relief in a court of equity, when there is no adequate remedy at law. These cases involved the assessment of corporate franchise values of public utility companies by the State Boards of Equalization, one in Illinois[1] and the other in Kentucky.[2]

The first of these cases was a sequence of the franchise litigation instituted against the public utility companies of Chicago. The constitution of Illinois provided that the capital stock of corporations was to be valued by the State Board of Equalization, who should determine its "fair cash value." Mandamus was issued against the State board, requiring them to determine the valuation of the stock and franchises of the defendant company.[3] Valuation having been made by the State Board of Equalization under this mandamus, bills were filed claiming that the action of the board was a denial of the equal protection of the laws in violation of the Fourteenth Amendment, as their property was valued at a higher rate, that is, at a higher proportion of its valuation than other taxables of the same class in the State. It appeared upon the hearing in the Circuit Court that the assessment of the capital stock had been raised over that of the preceding year, and to an amount equal to the current quotations of the stock on the Stock Exchange, and some thirty per cent above that of the uniform assessment of other property throughout the State, there being

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Oregon, there was more or less undervaluation of land, upon the plea, more understood than expressed, that this was the only way to keep even with money capital of the country and secure something like equality of burden.

[1] Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78 (1907), affirming 114 Fed. 657.

[2] The Kentucky Franchise Tax Cases, decided June 11, 1917, —— U. S. ——, 61 L. Ed. ——.

[3] See State Board of Equalization v. People, 191 Ill. 528 (1901).

no authorized classification system. The Circuit Court determined the valuation by capitalizing the earnings on a six per cent basis and then reducing the cash value by thirty per cent, so as to equalize the assessment with that of other property in the State according to the ratio fixed by the State Board of Equalization, and this amount was then divided by five in accordance with the State law at that time, directing that all valuations should be thus divided; and to this valuation of the intangible property the value of the tangible property was added, as provided by law. The assessment thus having been reduced some eighteen million dollars, the Circuit Court granted an injunction on payment of the taxes on the reduced amount.[1] This judgment of the Circuit Court, enjoining the enforcement of the original order of the Board of Equalization, was affirmed by the Supreme Court. It said that the action of the State Board was the action of the State, and, if carried out, would take the property of the companies without due process of law, and, by failing to give them the equal protection of the laws, constituted a Federal question beyond all controversy. The court said the action of the State board was one of the instrumentalities provided by the State for raising the public revenue by way of taxation, and, therefore, it represented the State, and its action was the action of the State, saying:

"There can be no contention of legality simply because of assessing the franchises of these corporations at a different rate from intangible property in the State, which the State might do, but it is asserted that the Board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the Board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations."

The court also said that the function of equalizing assessments by a State board was in this case omitted and ignored,

[1] For opinions of the Circuit Court on application for temporary injunction, see 112 Fed. 607, and on final decree, 114 Fed. 557.

as there was a failure to enforce uniformity throughout the State. The court said that under the facts a case was presented for the interposition of a court of equity, saying:

"A system of valuation was adopted and applied to a large class of corporations differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the appellee of a most serious and material nature. It is not a question of a mere difference of opinion in the valuation of property, but it is a question of a difference of method in the manner of assessing property of the same kind. Although the law itself may be valid, and provides for a proper valuation, yet if through mistakes on the part of the State, through its Board of Equalization and while acting as a *quasi* judicial body, the Board erred in the method to be pursued in relation to the corporations, the mistake is one which can be corrected in equity."

In this case there was no adverse citizenship; the jurisdiction was based solely on the Federal question involved. There was no evidence of fraud in the sense of corruption. The court was not concluded by the decision of the Circuit Court of the State in the mandamus case, as the companies assessed were not parties to that proceeding, and the question of discrimination was not involved therein.

The court, in its opinion, recognized the right of the State to classify such properties for taxation, and on this point reaffirmed the ruling to that effect in a prior Kentucky case,[1] but condemned the discriminating inequality of valuation in properties of the same taxable class, as violative of the equal protection of the laws.

§ 547. **Illegality of Unequal Valuation Reaffirmed—Jurisdiction of Equity.**—This same subject received full consideration in a series of cases involving the action of the State Board of Equalization of Kentucky in assessing the intangible property of corporations subject to the franchise tax on such cor-

[1] See *infra*, Sec. 547.

porations.[1] It had been ruled in a former case from Kentucky[2] that so much of the bill as sought an injunction against the collector of the State tax could not be maintained, but that a bill in the proper place could be brought to restrain the apportionment to the counties. The court said that this ruling might be deemed to have been overruled in the Chicago Union Traction cases,[3] where the assessment enjoined included State taxes as well as local taxes. It was, therefore, decided that State as well as so-called franchise taxes based upon an assessment of the intangible property of public service corporations made by the State Board, could be enjoined by discrimination arising out of the systematic undervaluation of other taxable property of the same class, where the proper State officers charged with the enforcement of the tax laws of the State were made parties. There was at this time no authorized classification in valuation of this class of properties for taxation. It seems in these Kentucky cases that it was shown that property in general was assessed at no more than fifty-two per cent of its actual value, while the railway property of the complainant was assessed at seventy-five per cent. The constitution of the State provided that all property should be uniformly assessed at its "fair cash value."

The court said the rule had been correctly declared by Judge Taft in the case cited,[4] that taxation by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the basis of ascertaining the taxable valuation. Attention was also called to the fact that several of the States had enacted laws adopting percentages of full valuation for taxation as a basis.[5] The court in commenting upon the systematic undervaluation of taxable property, said that the general terms arising from the statutory duty of assessors to assess the "fair cash value," together with "stereotyped affidavits denying discrim-

[1] L. & N. R. R. Co. v. Green, —— U. S. ——, 61 L. Ed. ——. decided June 11, 1917.

[2] See Coulter v. L. & N. R. R. Co., 196 U. S. 599, 49 L. Ed. 615 (1905), reversing 131 Fed. 282.

[3] *Supra*, Sec 546.

[4] *Supra*, Sec. 544.

[5] Iowa, 25%; Illinois, 20%, now 33⅓%; Nebraska, 20%; Alabama, 60%. See the State Systems, Appendix, *infra*. See also Sec. 536, *supra*.

ination and undervaluation, would not necessarily impair the probative effect of official assessments, and direct and substantial evidence from unimpeached and private sources, that the great mass of property in the State was intentionally, systematically and notoriously assessed far below its cash value."

The controlled mileage within and without the State is what a State Board must take into consideration in valuing interstate properties; and the action of both the Illinois and Kentucky Boards was sustained in adopting a 6 per cent interest rate as the basis of capitalization; and the findings of such Board, being *quasi* judicial, are not to be disregarded, unless it is shown that the Board was proceeding upon a wrong principle, or fraud appears. Controlled mileage within and without the State, and not merely operated mileage, must be taken into consideration in making such valuation.[1]

In determining and remedying such inequality of valuation of interstate properties, in order to avoid a double assessment, there must be deducted from the local apportionment of the total capital stock the value of the local portion of the mileage controlled in addition to the authorized deduction of the assessed value of the local property there situated. It is the local apportioned value of the total interstate property thus determined under the State law which is entitled to equality of valuation with other property of the same class in the State.

§ 548. **Inequality of Valuation as a Federal Question.**— In the case from Illinois, Sec. 546, *supra*, there was no adverse citizenship and the jurisdiction was based solely on the Federal question involved. In none of these cases was there any evidence of fraud in the sense of corruption. The rule was thus definitely laid down that where there is habitual and intentional discrimination in the valuation of property, resulting in substantial inequality of taxation, there is a denial of the equal protection of the laws and a Federal question is thus directly presented.

It follows therefore that, where there is habitual and intentional discrimination in the valuation of property of the same class, resulting in substantial inequality of taxation, there is a

[1] L. & N. R. R. v. Green, *supra*.

denial of the equal protection of the laws. The discrimination must not be sporadic or occasional, but substantial; that is, the relative undervaluation must extend to a large class of individuals or corporations, and not solely to one individual or corporation. It is immaterial, however, that the discrimination is aimed only against one individual or class, as the equal protection of the laws requires that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons and other classes in the same place and under like circumstances.

The State may classify and specialize in taxation (see Chapter XV) and thus, if the classification is natural and reasonable, subject different classes to different rates of taxation. It is true that the same result would be effected by a difference in the rate of valuation as by a difference in the rate of the tax. On account of the difficulty of reaching personal property, and particularly intangible personal property, for taxation, there is a very general disposition on the part of the assessors, frequently commented on by the courts, to value such property higher than real estate, which cannot be concealed. It is also true that some forms of personal property, such as money and securities and standard marketable articles, have a definite standard of value which real estate has not. In some States deductions for debts are allowed from assessments of personal property, and in some from credits only. These considerations may all influence assessors, and doubtless do so influence them, in discriminating valuations. But whether or not such considerations may afford a valid basis for classification, it is clear that such classification when authorized by the State constitution can only be made by the legislative power, and cannot be made by the arbitrary action of assessors. Such arbitrary discriminations by assessors between different classes of property in valuations for taxation are violative of due process of law as well as of the equal protection of the laws,[1]

[1] As to such discriminations see Dundee Mortgage and Investment Co. v. Parrish, *supra*, Sec. 545; see also National Bank v. New York, 64 N. E. Rep. 756 (1902), where the N. Y. Court of Appeals held that the

§ 549. **Proof of Discrimination by Cross-Examination of State Board of Equalization Members.**—In C., B. & Q. R. R. v. Babcock,[1] where the court affirmed the judgment of the Circuit Court, dismissing bills to enjoin the assessments made by the State Board of Equalization, the court condemned the calling of the members of the board, including the governor of the State, and submitting them to an elaborate cross-examination in regard to the operation of their minds in valuing and taxing the roads. The court said that although the members of the board might not be entitled to the *status* of judges, the case certainly did not differ from that of members of a jury or umpires; and even jurymen could not be called to testify to the motives and influences that led to their verdict, the court saying:

"All the often repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended as far as may be to be final, notwithstanding mistakes of fact or law."

The court said the record kept by the board was the best evidence, at least of its decisions and acts; and if an express ruling was desired, it should have been asked for; and that members of the board had a right to use their own experience, and they were created for that purpose, and, within its jurisdiction, except in the case of fraud or a clearly shown adoption of wrong principles, it was the ultimate guardian of certain rights.

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assessment of bank stock and other personal property at full value, while real estate was assessed at 60%, did not warrant injunctive relief. The case involved a question of procedure, and the decision also seems to have recognized the existence of legislative authority for the discriminating valuations.

[1] 204 U. S. 585, 51 L. Ed. 636 (1907). As to the *status* of State Board of Equalization in cases of alleged discrimination, see Missouri *ex rel.* Hill v. Tucker, *et al.*, 191 U. S. 165, 48 L. Ed. 133 (1903). As to the construction of the powers of a territorial Board of Equalization, see Copper Queen Mining Co. v. Arizona, 206 U. S. 474, 51 L. Ed. 1143, affirming 84 Pac. 511 (1907).

It would seem that this was a criticism rather of the abuse than of the legitimate use of the right of cross-examination. Where the issue of good or bad faith is raised, as it often is in such a litigation, it would seem that the testimony of the members of an administrative board charged with bad faith, would be admissible as to their motives subject to a legitimate use of cross-examination.[1]

§ 550. **Systematic Discrimination by Undervaluation of Other Property, Illegal.**—The rule, therefore, is definitely established in the Federal courts that a systematic intentional continuing omission or undervaluation of other taxable property of the same class by the taxing officers of a State or county, pursuant to a rule of practice adopted by them, the inevitable effect of which is an unjust discrimination in taxation against the property of the complainant and against other property similarly situated, is a violation of the equal protection of the laws guaranteed by the United States Constitution; and if there is no adequate remedy at law, such omission or undervaluation will sustain a bill in equity in the Federal court to enjoin the collection of the tax based on illegal discrimination. If such discrimination is violative of the State constitution or statute, relief may be had on that ground.[2]

It was said by the C. C. A., 8th Circuit, in a case involving taxation in a county of Colorado, that the law presumed that every man intended the natural and inevitable effect of his deeds, and that taxing officers who intentionally omit or undervalue other taxable property in violation of the constitution or statute, so that an undue share of the burden of taxation is necessarily thrown upon the property of the complainant, intended to discriminate against his property; and it was not necessary to the cause of action that the officers should have

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[1] See Coulter v. L. & N. R. Co., *supra*, where the court spoke of such testimony as anomalous, but seems to have considered its weight.

[2] Johnson v. Wells Fargo Co., 239 U. S. 234, 60 L. Ed. 243 (1915), affirming C. C. A., 8th Circuit, in 214 Fed. 180, which had reversed 205 Fed. 60.

had such actual intention, for their acts were as injurious or remedial without as with that intention.[1]

Where, on the other hand, there is no proof of such a scheme and of such intentional discrimination, but it appears that the assessment is intended in good faith to be on the same basis as that of other property, or if the errors made are incidental to, and consistent with an attempt to administer the law in good faith, there can, of course, be no relief. The charges of discrimination must not only be made, but proved.[2]

§ 551. **The Proof of Unlawful Discrimination.** — The party complaining of an unlawful discrimination, alleging a systematic and intentional omission or undervaluation of other property by the taxing officers of the State, often relies on facts which, although they may be in a popular sense of common knowledge, are not as easily proved as alleged. The proper proof in such cases was exhaustively discussed by the Circuit Court of Appeals of the Eighth Circuit,[3] where the court held that parties to a suit who admit in their pleadings that the actual value of property was far in excess of its assessed value are estopped from invoking, to sustain the assessment, the rule that where the discrimination of an issue of fact like the valuation of property for taxation is entrusted by statute to the judgment of an officer or board, his or its decision raises more than a presumption of fact and may not be overthrown by the testimony of two or three witnesses.

It was said by the same court in another case[4] that on the

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[1] See A. T. & S. F. Ry. Co. v. Sullivan, C. C. A., 8th Cir., 173 Fed. 456 (1909); see also Western Union Tel. Co. v. Trapp, 186 Fed. 114, C. C. A., 8th Cir. (1911), where the same ruling was followed with reference to taxation on an express company in Oklahoma. See also Mudge v. McDougal, 222 Fed. 562, Dist. of Ark. (1915), where this case was followed with reference to taxation in an Arkansas county. See also L. & N. R. Co. v. Bosworth, Eastern Dist. of Ky., 230 Fed. 191 (1915).

[2] Illinois Central R. R. Co. v. Mississippi R. R. Commission, 229 Fed. 248, Dist. of Miss. (1914).

[3] A. T. & S. F. Ry. Co. v. Sullivan, *supra.*

[4] Western Union Tel. Co. v. Trapp, *supra,* following Supreme Court in Railway Co. v. Backus, *supra;* Adams Express Co. v. Ohio State Auditor, *supra.*

issue whether there was an intentional reduction of property other than that of the public corporation by the State Board of Equalization it would be presumed that there was no such reduction, the burden of proving the contrary being on the complainant, and that the judgment of a State Board empowered to fix the valuation of property for taxation could not be set aside by proof that the value was other than that fixed by the board when there was no evidence of fraud and no gross error in the system on which the valuations were made.

A report made by a railway company to taxing officers under the statute for the purpose of aiding the officers in properly assessing its property was competent evidence against it of the fact stated therein in a suit to enjoin the collection of such taxes, but a report of the company to the Interstate Commerce Commission covering a period of time other than that on which the statute required the assessment to be based, and not made for taxation is not competent evidence. So as to the admission of agents and attorneys where they are authorized to act in the suit, they estop their principal, but are not competent evidence in another suit or proceeding. In this case there was an exhaustive examination of the practice of the assessor in the claim of the alleged under assessment and omission of other property.[1]

§ 552. **Full Valuation Enforced by Creditors.**—In another class of cases the question of valuation is raised, not by a taxpayer who complains of discrimination against him by the undervaluation of other property, but where a full valuation of all property in the taxing district is sought to be enforced by a creditor in a mandamus proceeding to enforce taxation in payment of a judgment against a county or municipality. In such cases the judgment creditor is enforcing through mandamus proceedings what has been adjudged to be a contract right growing out of the contractual engagement made by the muni-

[1] A. T. & S. F. Ry. Co. v. Sullivan, *supra*. For detailed discussion of the evidence of the omission and undervaluation of different classes of property, see opinion in Sullivan and Bosworth cases, *supra*.

cipal corporation, and it is an impairment of the obligation of the contract to destroy or lessen the means by which it can be enforced.[1] Thus, mandamus was held to lie to compel the assessor and equalization officers in an Arkansas county to require all property subject to taxation therein to be taxed at full value, and that it was no defense to the county board, that they had equalized the property of the county at a valuation of fifty per cent of the full value.

It seems that in this case the judgment had been recovered by the contractor who had built the court house, and it was stipulated in the contract that the county would, if necessary, increase the court house building tax or the assessed valuation of the county to the full market value of the taxable property of the county as provided by law. The court said that it was not a question of whether the assessor had a right to assess property at fifty per cent of its value, but that they could not do it to the prejudice of the contractual rights of the relator, saying:

"If Monroe County can contract with the relator for the use of its people, accept the same, and then refuse to pay for it on the ground that, in violation of the constitution and laws of Arkansas, it is assessing property for taxation at only fifty per cent of its true value, then our courts of justice are established for no purpose."[2]

Thus, in a State where, at the time a contract was made, all property taxable was required to be assessed by the City Recorder at its full value, and subsequently a State statute was passed requiring all assessments to be made by a county as-

[1] *Supra*, Sec. 81; Huidekoper v. Hadley, *et al.*, *supra*, Sec. 360.

[2] U. S. *ex rel.* v. Jimmerson, C. C. A., 8th Cir., 222 Fed. 489 (1915). The Supreme Court of Arkansas, in State v. Meek, 192 S. W. 203 (1907), declined to follow this case under a similar state of fact, and held that the State Supreme Court was the final arbitrator in construing State Constitutions and laws, and said that the fact that county officers contracted to assess property at full value could create no greater obligation than the law imposes, and that mandamus could not be used to compel an officer to make tax assessments disturbing this State equalization.

sessor, and next by the State Board, and that under this equalization the property was assessed at only some seventy per cent of its actual value, the court held that such statute was void and that mandamus would be granted against the recorder, compelling an assessment for property at its true value.[1] It follows, therefore, that while a State may adopt such a percentage of true value for taxable valuation as it deems proper, or may equalize values at percentages below the true value, such right must be exercised subject to the right of creditors who have a contract right to enforce full value for taxation in contracts with counties and other subdivisions of the State.

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[1] City of Cleveland, Tennessee v. U. S. *et al.*, C. C. A., 6th Cir., 166 Fed. 677 (1909).

CHAPTER XVII.

THE TAXING POWER OF CONGRESS.

§ 553. Taxing power of Congress granted by Constitution.
554. Purpose for which taxing power may be exercised.
555. Appropriation of public money.
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597. The taxing power in case of unincorporated territories.
598. Taxation in District of Columbia.
599. Power of Congress in enforcing collection of taxes.

Art. I, Section 8 of the Constitution of the United States:

"Section 8. The Congress shall have power: To lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises, shall be uniform throughout the United States."

Art. I, Sec. 9, paragraph 4:

"No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Art. I, Sec. 9, paragraph 5:

"No tax or duty shall be laid on articles exported from any State."

Amendment XVI. Adoption proclaimed February 25, 1913:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

§ 553. **Taxing Power of Congress Granted by Constitution.** —The Constitution of the United States, while restraining, expressly and by necessary implication, the taxing power of the States, grants certain taxing powers to Congress. As the Federal government under the Constitution is one of delegated powers, we must find the taxing power of Congress in the express or implied grants of the Constitution. Thus it is said by Justice Story:[1]

[1] Martin v. Hunter, 1 Wheaton 304, l. c. 326, 4 L. Ed. 97 (1816).

"The government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

There is no power of taxation inherent in the United States, as there is in the States. The most serious vice of the Confederation was the absence of power in Congress to raise its own revenue for the execution of its powers. The Constitution therefore granted to Congress specific powers of taxation dealing directly with the subject of taxation, exclusive as to duties on foreign imports, and concurrent with the States in internal taxation, subject to the qualifications of uniformity and apportionment in the exercise of these powers thus granted, as stated in the clauses quoted. In his opinion in Gibbons v. Ogden,[1] Chief Justice Marshall distinguished between this concurrent power of taxation and the power to regulate commerce, saying that the exercise of the taxing power by Congress does not interfere with the power of the State to tax for the support of its own government, and that, when each exercises the power of taxation, neither is exercising the power of the other.[2]

§ 554. **Purpose for Which Taxing Power May be Exercised.** —It seems to be settled that the words in Article I, Section 8, above quoted, "To pay the debts and provide for the common defense and general welfare of the United States," do not grant a distinct power to Congress, but simply declare the object of the taxing power preceding, so that the clause is equivalent to the following: "Congress shall have power to lay and collect taxes, duties, imposts and excises, in order to pay the debts and provide for the common defense and general welfare of the United States." Congress therefore has not an unlimited power as to the purpose of taxation, and can levy taxes only for these specific objects.[3]

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[1] See *supra*, Sec. 3.

[2] Concurrent Powers of Taxation, *supra*, Sec. 3.

[3] Story's Commentaries on the Constitution, Vol. 1, Sec. 907. He says that the view that paying the debts and providing for the common defense and general welfare constitutes another substantial power

This limitation of the purposes for which taxes may be levied by Congress, while historically interesting, is really addressed to the legislative discretion rather than to the judicial power, for the reason that the specific purposes for which the proceeds of taxes are to be expended are not declared in the Acts of Congress levying them, and the courts cannot look beyond the acts themselves to discover those purposes. The same principle applies in the judicial review of the purposes for which State

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distinct from the power to tax, would make the government one of general and unlimited powers, and that, while this view has been maintained by minds of great ingenuity and liberality, the contrary opinion has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable. He says also, Sec. 926, that the argument in favor of the restricted construction has, perhaps, never been presented in a more precise and forcible shape than in the official opinion of Mr. Jefferson on the proposed Bank of the United States, February 16, 1791, as follows: "For the laying of taxes is the power, and the general welfare the purpose for which the power is to be exercised. Congress is not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner they are not to do anything they please, to provide for the general welfare, but only to lay taxes for that purpose." 7th Jefferson's Works 757.

In this construction Mr. Hamilton agreed, see Report on Manufactures, where he contends that, while the power to lay taxes is confined to purposes for the common defense and general welfare, the power of appropriation of public moneys is co-extensive, that is, that it may be applied to any purposes for the common defense and general welfare. The late Justice Miller in his Lectures on the Constitution, says, page 230: "At one time I did not concur in this peculiar manner of punctuating this instrument by commas and semicolons, without a period coming in between the opening words of this 8th section, 'Congress shall have power,' and the 18th clause with which it concludes. This clause, however, in regard to paying the debts and providing for the common defense and general welfare constitutes a proper qualification of the power to collect taxes, and in what may be called the same sentence is followed by the limitation requiring all duties, excises and imposts to be uniform, so that it seems probable that the meaning is that Congress shall have power to lay these taxes and collect them in order 'to pay the debts and provide for the common defense and general welfare.'"

See also John Randolph Tucker's Commentaries on the Constitution of the United States, Sec. 222.

taxes are levied, and such questions in the courts have usually related to the validity of municipal bonds, for the payment of which taxation is required.[1]

Under the permanent revenue system of the government,[2] taxes are levied, not for specific purposes, but by continuing laws establishing the rate of customs duties and internal revenue taxes, and questions relating to the lawful purposes of taxation do not arise in the levying of taxes, but in the appropriation of public funds for public needs.

The power of taxation is sometimes invoked with no purpose of revenue in view, but solely to destroy the interest or business upon which the tax is levied, by taxing it out of existence. Thus the tax upon the State bank notes was imposed to destroy their use, so as to open the means for circulating the notes of the national banks.[3] While the only lawful purpose of taxation is revenue, the amount of the tax on any subject within the scope of the taxing power is for the legislative discretion to determine.

"It is a perplexing inquiry unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to an abuse of the power."[4]

A legislator may therefore vote against an act, which he as a legislator deems unauthorized by the Constitution, and yet as a judge he might be compelled to sustain the same act as an exercise of legislative discretion not subject to judicial review.[5]

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[1] See Ch. XII, on Public Purpose of Taxation.

[2] As to permanent tax laws, see Tucker on Constitutional Law, Secs. 239 and 240. He says that our system of permanent tax laws destroys the relation between taxation and representation. For difference between English and American practice as to revenue bills, see Miller's Lectures on the Constitution, pages 203 to 208.

[3] See *infra*, Sec. 585.

[4] Chief Justice Marshall in McCulloch v. Maryland, 4 Wheaton, 438, *supra*.

[5] In the 54th Congress the extent of the taxing power of Congress in suppressing industries was discussed in connection with the attempted passage of the so-called "anti-option" bill, proposing to tax out of existence the dealings in "options" and "futures." Some held that the taxing power was inadequate and relied on the commerce clause.

§ 555. **Appropriation of Public Money.**—The Constitution provides[1] that no money shall be drawn from the treasury but in consequence of appropriations made by law. In the exercise of this power of appropriation, or the expenditure of the proceeds of taxation, there could be no question as to two of the three authorized objects of expenditure, the payment of the debts, and the providing for the common defense. There was, however, a great difference in the opinions of the great master-minds in the formation and defense of the Constitution, Hamilton and Madison, as to the power of Congress to appropriate "for the general welfare of the United States." Thus Mr. Madison held that the words "general welfare," as a general description of the objects of the taxing power, were limited by and commensurate with the objects of the Constitution as defined in the enumerated powers specified, and that there can be no general welfare intended by the Constitution beyond what Congress has power to create, regulate and control by virtue of the enumerated powers. On the other hand, it was held by Mr. Hamilton that the words, "general welfare" include, not only the enumerated powers of the Constitution, but whatever Congress may deem to be for the general welfare.[2]

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[1] Art. I, Sec. 9, Par. 6.

[2] Justice Story said, 1 Story on Const., Sec. 958, of this and the other questions arising out of this same grant to Congress of its taxing power, viz.: "Whether the government has a right to lay taxes for any other purpose than to raise revenue, however much that purpose may be for the common defense, or general welfare," that each of these questions had given rise to much animated controversy. The former involves the question whether Congress can lay taxes to protect and encourage domestic manufactures; the latter, whether Congress can appropriate money to internal improvements. "Each has been affirmed and denied, with great pertinacity, zeal and eloquent reasoning; each has become prominent in the struggles of party; and defeat in each has not hitherto silenced opposition, or given absolute security to victory. The contest is often renewed; and the attack and defense maintained with equal ardor. In discussing this subject. we are treading upon the ashes of yet unextinguished fires, *incedimus per ignes suppositos cineri doloso.*"

The question was practically determined by Congress in the matter of internal improvements, that while it could not constitutionally

But this question of the limitation of the legislative power in appropriation, for the reasons already stated, is political rather than judicial, and the subject has become, from a legal point of view, academic rather than practical since the decision of the Supreme Court in McCulloch v. Maryland, wherein the court held that Congress could establish a bank, although there was no authority given it in the enumerated powers of the Constitution to create a corporation of any kind. The court said that the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct war and support armies and navies carry with them the selection of the means for those great ends, saying at page 415: "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code."

The court called attention to the concluding clause of the eighth section of Article I, giving the power to make all laws necessary and proper for the carrying into execution the preceding powers, and said at p. 420:

"The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitu-

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build canals and other works of internal improvement, it could appropriate money therefor. For the Hamiltonian view, see Report on Manufactures. For Mr. Madison's view, see veto message, March 3, 1817. For a thorough review of the subject from an anti-Hamiltonian view, see John Randolph Tucker's Commentaries on the Constitution, Vol. 1, Sec. 234, *et seq.*

tion must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the highest duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

§ 556. **Supreme Court on Bounty Legislation.**—The practical difficulty in the review by the judiciary of the congressional discretion in the appropriation of public funds, is illustrated in the history of the bounty clause in the Tariff Act of 1890. This provided for payment from the treasury of the United States to the producers of beet sugar of a *bounty* of two cents or one and three-quarter cents per pound, according to the grade of the sugar. The constitutionality of this bounty was gravely doubted, and it was contended that the provision was void under the rule declared in Loan Association v. Topeka.[1] But the Supreme Court, in a case involving the validity of the Tariff Act of 1890,[2] declined to pass upon the constitutionality of this provision, though they conceded its grave importance, saying, l. c. p. 695, "it would be difficult to suggest a question of larger importance or one the decision of which would be more far-reaching." The court said that even if it was unconstitutional, it would not invalidate the other sections of the tariff act, as the different objects had no legal connection with each other.

Subsequently, in the Tariff Act of 1894, Congress repealed this bounty provision, enacting that thereafter it should be unlawful to issue any licenses or pay any bounty for the production of sugar at any time. It seems, however, that when this repealing act was passed, certain manufacturers had taken out licenses under the act and had produced and manufactured the sugar on the faith thereof, but, by reason of the repeal of the act, were unable to obtain the money from the treasury on the

[1] See *supra*, Ch. XII, The Public Purpose of Taxation.

[2] Field v. Clark, 143 U. S. 649, 36 L. Ed. 294 (1892).

warrants which had been issued to them. Congress therefore passed an act in 1895 appropriating money for the payment of those manufacturers and producers of sugar, who had complied with the act, but were debarred from payment by reason of its repeal in 1894. It seems that the parties who were entitled to payment under this act were few in number, and the appropriation called for about $250,000. The proper disbursing officer of the treasury refused to pay the warrants drawn pursuant to the act, upon the ground that the act was unconstitutional. A Louisiana corporation, entitled to payment under this act of 1895, applied to the Supreme Court of the District of Columbia for a *mandamus* against the Secretary of the Treasury and the Commissioner of Internal Revenue, to compel action on their part under the act. The act was declared unconstitutional by the Court of Appeals of the District of Columbia, on the ground that the bounty provision itself was unconstitutional and any appropriation on account of it invalid.[1] The Supreme Court[2] avoided any decision as to the validity of the bounty legislation in the act of 1890, but sustained the act of 1895, as within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations and upon principles of right and justice. When it has decided such questions in the affirmative, and has appropriated public money for the payment of such claims, said the court, "its decision can rarely, if ever, be the subject of review by the judicial branch of the government."

§ 557. **Moral and Equitable Claims as "Debts."** — It was argued in this case that there could be no valid claim growing out of an unconstitutional act. But the court said that the question involved was, not the validity of the claim under the unconstitutional act, but whether honorable considerations could arise warranting the appropriation. The parties whom Congress reimbursed could not be held to know, what no one else could know prior to the determination of that fact by some judicial tribunal, that the bounty law was unconstitutional. The

1 United States *ex rel.* v. Carlisle, 5 D. C. App. 138 (1895).

2 United States v. Realty Co., 163 U. S. 427, 41 L. Ed. 215 (1896).

power to raise money to pay the debts of the United States includes the power to appropriate the money when raised for that object, and the debts of the United States are not limited to those evidenced by some written obligation or otherwise of a strictly legal character. The court cited instances of appropriations of like character since the foundation of the government, and said:

"Of course, the difference between the powers of the State legislatures and that of the Congress of the United States is not lost sight of, but it is believed that in relation to the power to recognize and to pay obligations resting only upon moral considerations or upon the general principles of right and justice, the Federal Congress stands upon a level with the State legislature."

§ 558. **Conclusiveness of Legislative Determination as to What are "Debts."**—The decision in the case cited establishes not only the principle that the term "debts" includes those debts or claims which arise upon a merely honorary obligation and would not be recoverable in a court of law if existing against an individual, but also that the determination of Congress in any given case that an appropriation is warranted upon such honorable and moral considerations cannot be reviewed by the courts. The opinion in this case is interesting and important, as it illustrates the practical difficulty of enforcing in any case the constitutional restrictions as to the purpose for which taxes can be levied. Thus the court said in this case, p. 444:

"In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government."

§ 559. **Taxes, Duties, Imports and Excises.**—The power to tax contained in Article I, Section 8, of the Constitution is to

lay and collect taxes, duties, imposts and excises. The terms "tax" and "duty" are used in paragraph 1 of Section 9 and in paragraph 5, in respect to articles exported. The term "duty" in a narrower sense as used in the Constitution relates to customs duties, and has been held equivalent to imposts. Thus, in Section 10 of Article I of the Constitution, the States are prohibited from laying any imposts or duties on imports or exports; but "duties, imposts and excises" in Section 8 are distinguished from other taxes which Congress has power to levy, in the requirement that they shall be uniform throughout the United States.[1]

An excise tax has been defined as one which is assessed upon some article of personal property, or money, or something which is exhausted in the use.[2] It is one which from its essence and nature must be paid in fact by the last man who buys and uses the property, because whoever has it, at the time when the tax is levied upon it, adds that amount to the selling price, when he comes to dispose of it or the property is consumed. From its derivation (*excidere*—to cut off) it means a tax upon specific commodities, paid at some time between the manufacture and the consumption. As used in the constitutional grant of the

[1] See Story's Commentaries, Sec. 952; Knowlton v. Moore, 178 U. S. 41, 87, 41 L. Ed. 969 (1900). Mr. Madison in his letter on the tariff of September 18, 1828, 4 Elliot's Debates 600, says as to these different terms used in the grant of the taxing power:

"Pleonasms, tautologies and the promiscuous use of terms and phrases differing in their shades of meaning (and always to be expounded with reference to the text and under the control of the general character and manifest scope of the instrument in which they are found) are to be ascribed sometimes to the purpose of general caution, sometimes to the imperfection of language, and sometimes to the imperfection of man himself. In this view of the subject it was quite natural, however certainly the general power to regulate trade might include a power to impose duties on it, not to omit it in a clause enumerating the several modes of revenue authorized by the Constitution. In few cases could the '*ex majori cautela*' occur with more claim to respect."

The term "duty" is used sometimes in the general sense of tax—as a "stamp duty."

[2] Miller's Lectures on the Constitution, p. 238.

taxing power to Congress, the term has been given a broader meaning, so that it includes practically all taxes, other than customs duties, which are not direct taxes and which therefore do not require to be levied by the rule of apportionment.[1] Thus taxes on inheritances, on commercial exchange sales and stamp taxes of all kinds have been held to be excise taxes within the meaning of the constitution.[2] In the Head Money cases,[3] the tax levied by Congress on the business of bringing passengers from foreign countries was held to be an excise duty within the meaning of the constitution.

The tax levied by Congress on manufactured tobacco is a tax on an article manufactured for consumption and imposed at a period intermediate the commencement of the manufacture and the final consumption, and is also an excise tax under the constitution.[4] In the case last cited the court reviewed the different definitions of the term excise, including that of Dr. Johnson, "A hateful tax levied upon commodities," an opinion which, the court says, was evidently shared by Blackstone, who said, after mentioning the number of articles that had been added to those excised, that it was "a list which no friend of his country would wish to see further increased." But the Supreme Court said that these are considerations of policy to be determined by the legislative branch, and not of power to be determined by the judiciary. All of the taxes enumerated in the various statutes for the collection of internal duties are not excises, but the great body of them, including the tax on tobacco, are plainly excises within the accepted definition of the term.

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[1] In Maine v. Grand Trunk R. R. Co., *supra*, Sec. 231, the term "excise" in a State statute was held properly applicable to the license for the exercise of corporate privileges in the State, based on the State's mileage proportion of the gross earnings. In State v. Hamlin, 86 Maine 495, an inheritance tax was classed as an excise tax.

[2] Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. Ed. 95 (1869); Sholey v. Rew, 23 Wall. 331, 23 L. Ed. 99 (1875); Nicol v. Ames, 173 U. S. 509, 43 L. Ed. 986 (1899); Knowlton v. Moore, 178 U. S. 41, *supra*.

[3] 112 U. S. 580, *supra*.

[4] Patton v. Brady, 184 U. S. 608, 46 L. Ed. 713 (1902).

The taxing power therefore conferred by the constitution upon Congress, it has been repeatedly held, includes all the subjects of taxation, under three express restrictions: First, direct taxes must be levied according to the rule of apportionment; second, all taxes must be uniform throughout the United States; and, third, no tax can be levied upon exports. These are the express limitations upon the exercise of the general taxing power granted to Congress. There is also an implied limitation to this general grant, growing out of the relation of the Federal government to the States, and another, it has been claimed, growing out of the prohibition in the constitution against the diminution of salaries during continuance in office.

§ 560. **What are Direct Taxes.**—The Constitution provides,[1] that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." Another clause[2] provides that "representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." The abolition of slavery made the "other persons" freemen, and it was provided by the second section of the Fourteenth Amendment that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." No change was made by the Fourteenth Amendment in the provision for the apportionment of direct taxes.

Capitation or poll taxes and other direct taxes must therefore be apportioned among the States, each of which must pay according to its population and not according to its wealth.[3]

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[1] Art. I, Sec. 9, Par. 4.

[2] Art. I, Sec. 2, Par. 3.

[3] A direct tax amounting to $20,000,000 was levied by Congress August 5, 1861, and apportioned to the States in proportion to the population as shown by the census. The tax was levied upon lands

The view was first entertained that the only other direct tax, besides the capitation or poll tax, was a tax upon land, and in Hylton v. United States,[1] which appears to have been the first decision of the Supreme Court as to the taxing power of Congress, a tax upon carriages kept for the party's own use was held not to be a direct tax, and therefore not required to be levied by the rule of apportionment. The same ruling was made with reference to the Income Tax of 1864, levied during the Civil War, which was declared to be, not a direct tax, but an excise tax, in a case involving a tax on income from professional earnings and from United States bonds.[2]

But the whole subject was re-examined in connection with the Income Tax of 1894, and the court there, upon full consideration, decided that the tax upon incomes from land is a direct tax, the same as if levied upon the land itself. The court, however, eight justices sitting, was equally divided on the questions of whether the same rule applied to incomes from personal property and whether the invalidity of the provision as to the income from rentals would invalidate the act.[3]

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and improvements, the public property of States and the United States excepted. It was held in United States v. Louisiana, 123 U. S. 32, 31 L. Ed. 69 (1888), that the act imposed no obligation upon the States as such, though the States could assume, and some did assume, the amounts apportioned. After the Civil War the collection of the tax was suspended by Congress, and the amounts collected were subsequently refunded to the States. For the enforcement of the direct tax by sales of delinquent lands, see Turner v. Smith, 14 Wallace 553, 20 L. Ed. 724 (1872); Keely v. Sanders, 99 U. S. 441, 25 L. Ed. 327 (1879); Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845 (1886).

[1] 3 Dallas 171, 1 L. Ed. 556 (1796).

[2] Springer v. United States, 102 U. S. 586, 26 L. Ed. 253 (1881).

[3] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 39 L. Ed. 759 (1895). Justices White and Harlan dissenting and Justice Jackson absent. The justices all agreed in holding that the tax on income from bonds of municipal corporations was invalid as a tax upon the agencies of the State. The justices were also equally divided upon the question whether any part of the income tax, if not considered as a direct tax, was invalid for want of uniformity on either of the grounds suggested. Upon the rehearing, however, this question of

Upon the rehearing, the tax on income, not only from real estate, but also from personal property, was adjudged a direct tax, and the whole act, since it was one entire scheme of taxation, was therefore declared void.[1]

§ 561. **The Income Tax Amendment of 1913.**—Congress, on July 31, 1909, submitted to the States for ratification Amendment XVI to the Constitution of the United States, as follows:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

And on February 25, 1913, this amendment was declared, by proclamation of the Secretary of State, duly adopted.

On October 3, 1913, Congress enacted an Income Tax Law which, re-enacted in 1916, is still (1917) in force. Prior to the adoption of this amendment, Congress, on August 5, 1909, had enacted what was termed an excise tax on corporations in the Payne-Aldrich Tariff Act of that date. These provisions were repealed by the act of October 3, 1913, though continued in force for the collection of taxes for the year 1913. This act of October 3, 1913, enacted under the authority of the Amendment XVI, and re-enacted in 1916, provides for the taxation of incomes of both individuals and corporations.[2]

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uniformity was not decided or considered, the other questions decided being decisive of the case. As to uniformity in Federal taxation, see *infra*, Sec. 569.

[1] 158 U. S. 601, 39 L. Ed. 1108 (1895), Justices Harlan, Brown, Jackson and White dissenting.

[2] See U. S. Compiled Statutes, 1913, Secs. 6319 to 6336. These sections were enacted as the income tax provisions of the Underwood Tariff Act of October 3, 1913.

These sections were again revised in the Federal Revenue Law approved September 8, 1916, containing the following:

1. Income Tax.
2. Estate (Inheritance) Tax.
3. Munitions Manufacturer's Tax.
4. Miscellaneous Taxes.
5. Dye Stuffs.
6. Printing Paper.
7. Tariff Commission.
8. Unfair Competition.
9. Miscellaneous Provisions.

Title one (1) of the above is a complete Income Tax superseding

§ 562. **The Corporation Excise Tax of 1909 Constitutional.** —Prior to the adoption of the Sixteenth Amendment the Supreme Court affirmed the constitutionality of the act of August 15, 1909, known as the Corporation Tax Law, holding that it was not a direct tax, but an excise tax, upon the carrying on or the doing of business in a corporate or *quasi* corporate capacity.[1] There was such a substantial difference between the carrying on of business by corporations, and the same business when conducted by a private firm or individual, as justified this excise tax. It was immaterial that part of the income was derived from property that was in itself not taxable. There was no interference with the rights of the States in this excise tax upon corporations, and public service corporations were properly subject to the tax. The court also sustained the exemption in the act of corporations, whose income was under $5,000 per annum, and also the exemption of labor, agricultural and other non-business corporations, nor was there any violation of the geographial uniformity required by the constitution.

It was held also that real estate trusts not organized under any statute[2] and corporations which were not engaged in active business, but only holding the title to property under lease, were not included in the terms of the act.[3]

So also a railroad company, which had leased its railroad and was not engaged in operating the same, was not included in the act.[4]

On the other hand, mining corporations engaged solely in mining upon their own premises were subject to the act and

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the Act of October 3, 1913, recast, rearranged and modified. (See Appendix.)

(For War Tax of 1917, see Appendix.)

[1] Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. Ed. 389 (1911).

[2] Elliott v. Freeman, 220 U. S. 178, 55 L. Ed. 424 (1911).

[3] Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. Ed. 428 (1911).

[4] McCoach v. Minehil & S. H. R. Co., 228 U. S. 295, 57 L. Ed. 842 (1913). Neither was the income derived from the management of street railway lines by receivers under the supervision of the court subject to the act. U. S. v. Whitridge, 231 U. S. 144, 58 L. Ed. 159 (1913).

the proceeds of the ore so mined constituted income under the act.[1]

This act was therefore sustained as constitutional, not in any proper sense an income tax law, but an excise upon the conduct of business in a corporate capacity, the tax being measured by the reference to the income in a manner prescribed by the act itself.[2] The term "entire net income" did not allow the deduction of interest upon the bonded or other indebtedness of the corporation whether secured by mortgage or not. The court said there was no merit in the claim, that this construction of the act resulted in an arbitrary classification.

§ 563. **Constitutionality of the Income Tax Act of 1913 Sustained.**—The Supreme Court[3] affirmed the judgment of the District Court of New York dismissing a bill in a suit by a stockholder to restrain a corporation from voluntarily complying with the Federal Income Tax provisions of the Tariff Act of October 3, 1913, holding that these provisions, that is, of the Income Tax Law of 1913, were valid in all respects and enforceable.

The bringing of the suit did not violate the provisions of Sec. 3224, R. S. In this respect the ruling made in the Pollock case[4] was followed. The court caid the whole purpose of the Sixteenth Amendment was to exclude the source, from which a tax income was derived as the criterion, by which to determine the applicability of the constitutional requirement as to the apportionment of direct taxes. The provision of the act fixing the preceding March 1st as the time for which the taxed income for the first ten months was to be computed was sustained, since the date of

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[1] Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. Ed. 285 (1913). The court in this case did not discuss the question of depreciation as it was not properly included in the question certified for determination.

[2] Anderson v. 42 Broadway, 239 U. S. 69, 60 L. Ed. 152 (1916), reversing the Cir. Ct. of App. 2nd Cir., 213 Fed. 777.

[3] Brushaber v. Union Pacific R. Co., 240 U. S. 1, 60 L. Ed. 493 (1916).

[4] *Supra*, Sec. 560.

the retroactivity did not extend beyond the time when the constitutional amendment became operative.

It was also held that Congress had power to exclude from taxation some income of designated persons and classes, and to exempt entirely certain enumerated organizations, such as labor, agricultural, horticultural organizations, etc.

The court reaffirmed its former rulings that geographical uniformity only is exacted by Art. 1, Sec. 8.

The Fifth Amendment of the constitution, concerning due process of law, is not a limitation upon the taxing power conferred upon Congress by the Federal Constitution unless under a seeming exercise of the taxing power, the taxing statute is so arbitrary so as to compel the conclusion that it was aimed at the confiscation of the property and is so wanting in basis for classification as to produce such a gross and patented inequality as inevitably to lead to the same conclusion. The progressive rate feature in this act was not an arbitrary abuse of power and was sustained.

The methods of collection at the source were also sustained against all the objections urged, nor was there any unlawful discrimination between individuals and corporations.

The deductions allowed in the act, and the discrimination between married and single people, and husbands and wives who are living together and those who are not, and the failure to require the estimation of rental value, or the computation of family expenses, or the conferring of certain administrative powers upon the Secretary of the Treasury in the enforcement of the act, were all sustained as valid legislation.

These rulings were reaffirmed in another case decided at the same term,[1] and it was held that corporations are not unconstitutionally discriminated against, because of the exemption, which the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, Ch. 16) make of individual incomes below $4,000; that labor, agricultural and horticultural organizations, mutual savings banks, etc., could be excepted from

[1] Stanton v. Baltic Mining Co., 240 U. S. 103, 60 L. Ed. 546 (1916).

the operations of the income tax without rendering the tax repugnant to the Federal Constitution, and the tax imposed by the income tax law upon the product of the working of a corporate mine is not a direct tax on property by reason of its ownership, because adequate allowances may not be made for the exhaustion of the ore body resulting from working the mine.

Mining companies and their stockholders are not denied the equal protection of the laws, nor deprived of their property, without due process of law contrary to the United States Constitution, Fifteenth Amendment, by the income tax provisions of the Tariff Act of October 3, 1913 (38 Stat. at L. 166, Ch. 16), under which the deduction permitted for depreciation arising from the depletion of ore depositions is limited to five per cent of the gross value at the mine of the output during the year, while other individuals or corporations have the right to deduct a fair and reasonable percentage for losses for depreciation.

§ 564. **Inheritance Tax Not Direct Tax.**—The meaning of the term direct taxes was thoroughly argued and considered by the court in the case of the inheritance tax enacted in the Spanish War Revenue Act of 1898.[1] The inheritance or succession tax enacted during the Civil War had been adjudged an excise tax[2] and therefore not a direct tax. But, as it had also been decided under the same revenue act that an income tax was an excise tax and not a direct tax, it was argued that this decision had been overruled by the decision upon the Income Tax of 1894. The court held, however, that the case of Scholey v. Rew had not been overruled, but had been distinguished on the ground that the income tax was not involved in the case. "Undoubtedly," the court said, "in the course of the opinion in the Pollock case, it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because imposed

[1] Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969 (1900).

[2] Scholey v. Rew, 23 Wallace 331, 23 L. Ed. 99 (1875).

upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty." The inheritance tax was therefore sustained as an excise tax and the decision in Scholey v. Rew was reaffirmed.[1]

§ 565. **Direct Taxation in Economic Sense and Constitutional Sense Distinguished.**—It was strongly urged in Knowlton v. Moore that the ability to "shift the tax" was the basis of distinction adopted by the economists between an indirect and a direct tax; that is, if the party upon whom by law the burden of paying the tax was first cast could thereafter shift it to another person, the tax would be indirect, while if he could not shift it, the tax would be direct in the economic and in the constitutional sense. The court replied, however, that, although this theory of the economists had been referred to in the Income Tax cases of 1894, it was not the basis of the conclusion of the court. The constitutional meaning of the word "direct" was the matter decided. As to this economic distinction, the court reiterated, page 83, what had been said in Nicol v. Ames:[2]

"In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category, which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results

[1] For construction of the inheritance tax of June 13, 1898, with reference to the effect of the saving clause of the repealing act of April 12, 1902, see Hertz v. Woodmen, 218 U. S. 204, 54 L. Ed. 1001 (1910), and as to the taxation of residuary legatees before the happening of the contingency of reaching a certain age, see Vanderbilt v. Eidman, 196 U. S. 480, 49 L. Ed. 563 (1905), and as to the computation of the value of a life estate, see Herold v. Kahn, C. C. A. 3rd Cir. 159 Fed. 680 (1908).

[2] 173 U. S. 509, 515, *supra*, Sec. 559.

would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political enonomy."

§ 566. **The War Revenue Act of June 13, 1898.**—In the so-called Spanish War Revenue Act of 1898 different forms of taxation were imposed, since repealed, which involved judicial determination as to the taxing power of Congress and as to the meaning of direct taxation which required apportionment. Thus not only the inheritance tax was declared to be an excise tax, but also the stamp tax which required the stamps on contracts and conveyances. The court[1] held that this fell within the class of duties, imposts and excises which did not require apportionment, but only geographical uniformity throughout the United States. The same ruling was made as to the special taxes imposed upon sugar refineries to be measured by gross annual receipts in excess of a named sum. This was also declared to be an excise and not a direct tax.[2]

§ 567. **Direct Tax as Defined by the Supreme Court.**—The discussion in Knowlton v. Moore, and the other cases arising under the War Revenue Act of 1898, concerning the effect of the decision in the Income Tax cases, has, since the adoption of the Sixteenth Amendment, had only an academic or historic interest, as now income taxes can be levied, though dependent on the general ownership of property, subject only to the requirement of geographical uniformity.

It was, however, definitely determined by these decisions that taxes upon incomes from services, professions, etc., upon in-

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[1] Thomas v. United States, 192 U. S. 363, 48 L. Ed. 481 (1904), affirming 115 Fed. 207. See also United States v. Chamberlain, 219 U. S. 250, 55 L. Ed. 204 (1911), reversing 156 Fed. 881, construing the provisions of the statute for the enforcement of the collection of the stamp tax.

[2] Spreckles Sugar Refinery Co. v. McClain, 192 U. S. 397, 48 L. Ed. 496 (1904), reversing 113 Fed. 244.

heritances, upon occupations and commodities, were all included in the words "duties, imposts and excises," and, not being "direct taxes," could be levied by Congress in its discretion without regard to the rule of apportionment.[1]

§ 568. **Taxing Power of Congress Co-extensive with Territory of United States.**—The power of Congress in levying and collecting taxes, duties, imposts and excises, under Sec. 8 of Art. I of the constitution, is co-extensive with the territory of the United States and includes the District of Columbia. This was adjudged in an early case,[2] wherein it was contended that Congress could not impose a direct tax on the District of Columbia by the rule of apportionment for national purposes. The court, in an opinion by Chief Justice Marshall, declared that the right of Congress to tax the District did not depend solely upon the grant to Congress in the constitution of exclusive legislative power over the District. The granting of the taxing power in the constitution was generally without limitation as to place. It consequently extends to all places over which the government extends. If this could be doubted, the doubt would be removed by the subsequent words in the constitution which modify the grant, that all duties, imposts and excises shall be uniform throughout the United States. The court continued, page 319:

"Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but one answer. It is the name given to our

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[1] The tax upon sugar refineries measured by gross receipts was held by the United States Circuit Court to be, not a direct tax, but an excise laid upon business. Spreckles Sugar Refining Co. v. McClain, 109 Fed. (Pa.) 76 (1901).

[2] Loughborough v. Blake, 5 Wheaton 317, 5 L. Ed. 98 (1820). Justice Brown in his opinion in Downes v. Bidwell, *infra*, Sec. 495, says as to this quotation from the opinion, "so far as applicable to the District of Columbia, these observations are entirely sound. So far as they apply to the territories, they were not called for by the exigencies of the case." 182 U. S., p. 262. But *contra*, see the concurring opinion of Justice White in the same case, p. 292, and the dissenting opinion of Chief Justice Fuller, p. 352.

great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

The argument was presented that this would necessitate extending all direct taxes to the District and territories, which would be, not only inconvenient, but contrary to the understanding and practice of the government. The court replied that, while Congress clearly has no power to exempt any *State* from its due share of the burden, as the second section of the first article of the constitution requires that direct taxation shall be extended to all the States upon the principle of apportionment, there is no necessity created for extending a direct tax to the District or territories, because the ninth section of the same article does not require such extension. The general grant of power to lay and collect taxes, on the other hand, was made in terms which comprehended the District and Territories as well as the States. The constitution may therefore be understood to give a rule when the Territories shall be taxed, without imposing the necessity of taxing them.

§ 569. **Uniformity in Federal Taxation.**—The Constitution provides that all duties, imposts and excises shall be uniform throughout the United States. The uniformity thus required is geographical only, that is, the tax must operate equally throughout the United States. Intrinsic uniformity, equality of operation upon all persons similarly situated under the construction given to the requirement of equality and uniformity in State constitutions and in the enforcement of the equal protection of the laws under the fourteenth amendment, is not required in this limitation upon Federal taxation.

Thus, in the Head Money Cases,[1] the Act of Congress regulating immigration and imposing a duty of fifty cents upon every passenger from foreign ports was held to be a uniform act, because it operated with the same force and effect in every place where the subject of it was found. It did not violate the requirement of uniformity, nor another provision of the Constitution directing that no preference should be given by the regulation of commerce to the ports of one State over those of another.[2]

This question of uniformity in taxation was thoroughly reviewed and definitely determined by the Supreme Court in the recent cases already referred to, involving the constitutionality of the War Revenue Act of 1898.[3] In the first of these cases the court said that the tax upon sales made upon commercial exchanges answered the requirement of uniformity, whether that term was to be understood in its geographical sense or as meaning intrinsic uniformity, that is, uniformity as to all the taxpayers similarly situated with regard to the subject-matter of the tax. It was uniform in the former sense, because it operated wherever such sales were made, and, in the latter or intrinsic sense, because the classification between the parties using such facilities in sales and those not using them was natural and therefore proper and legal.

But in the other case, Knowlton v. Moore, it was strongly argued that the inheritance taxation in question was lacking in intrinsic uniformity because it exempted legacies and distributive shares in personal property below $10,000, classified the rate of tax according to the relationship or absence of relationship to the decedent of the legatee or distributee, and provided for a rate of tax graded according to the amount of the legacy

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[1] 112 U. S. 580, *supra*. It was in this case and in this connection that Justice Miller, delivering the opinion of the court, stated the often quoted aphorism, "perfect uniformity and perfect equality in taxation, in all the aspects in which the human mind can view it, is a baseless dream."

[2] Art. I, Sec. 9, Par. 6.

[3] Nicol v. Ames, *supra*, Sec. 565, and Knowlton v. Moore, *supra*, Sec. 564.

or share. Under the decisions in some of the State courts such a tax would be invalid as wanting in intrinsic uniformity. But the court held in a learned and exhaustive opinion by Justice White, all the judges concurring, that the uniformity required by the Constitution in Federal taxation does not mean what the word "uniform" means, or the words "equal and uniform" mean, in the State constitutions. The former does not mean intrinsic, but only geographical, uniformity.

It was contended in this case that the act was lacking in geographical uniformity, as testamentary and intestate laws may vary in different States. The court replied that this was immaterial, as the same degree of relationship, or want of relationship, to the deceased, wherever existing, was levied on at the same rate throughout the United States. Geographical uniformity does not require that the objects of the tax must exist with uniformity in the several States. Taxes are uniform in the constitutional sense when they operate generally throughout the United States and uniformly wherever the subjects of the tax are found. Congress may select the subjects of taxation in its discretion, and it is immaterial whether the requirements of uniformity and equality, as understood in State taxation, are adhered to or not. The court called attention in its opinion to the fact that the requirement of uniformity in Sec. 8 only applies to duties, imposts and excises, and is not essential in the levy of all the taxes which the Constitution authorizes. Uniformity is not required in the levy of direct taxes, which are required to be apportioned. The effect of requiring inherent or intrinsic uniformity, therefore, would be that it would be applied only to those taxes to which, in the nature of things, the principle of such uniformity is least applicable and in which it is least susceptible of being enforced. Thus excise taxes and import duties, which are required to be uniform, look to particular subjects and take every conceivable form which may by the legislative authority be deemed best for the general welfare.

§ 570. **Uniformity in Levy of Duties.**—The requirement of geographical uniformity therefore extends to any form of tax-

ation not included in the term direct taxes. Thus, in the levy of duties upon importations, where specific and *ad valorem* duties are both employed, the same form of duty must be levied upon the same importation at whatever port it may be entered. Mr. Tucker, in his Constitutional Law, calls attention to an interesting illustration of this enforcement of uniformity in the duty on sugar,[1] where the use of different tests in the different ports to measure the exact saccharine strength was held by the Secretary of the Treasury to produce a difference of duty in the ports, destroying the uniformity established by the Constitution.

§ 571. **Levying Duties Under War Power.**—The uniformity clause of the Constitution received thorough and exhaustive discussion in the Insular Decisions of the Supreme Court, in cases involving the *status* of the territory acquired by the United States as the result of the Spanish War.

It was agreed by all of the judges that duties upon imports from the United States to Porto Rico collected by the military commander and by the President as commander in chief, from the time possession was taken of the island until the ratification of the treaty of peace, were legally exacted under the war power.[2]

The question of the collection of revenues during war had been considered in the cases growing out of the War of 1812, and also of the Mexican War. Thus, a town captured by the enemy in the War of 1812 was deemed a foreign country as respected our revenue laws during the period of hostile occupation, and the goods imported into that town during such occupation did not become liable to pay duty to the United States by reason of the resumption by that nation of its sovereignty.[3] A Mexican port acquired by the United States in the Mexican War and held by its military authorities did not thereby become a port of the United States, but remained a foreign port,

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[1] Tucker on Const., Sec. 218.

[2] Dooley v. United States, 182 U. S. 222, 45 L. Ed. 1074 (1901).

[3] United States v. Rice, 4 Wheat. 246, 4 L. Ed. 562 (1819).

and duties were properly levied upon goods imported therefrom into the United States.[1] Duties were also properly levied in San Francisco, after it was taken by the United States during the Mexican War and prior to the treaty of peace, under the war tariff established by the government; and, thereafter, duties levied by order of the government in accordance with the Act of Congress were held properly levied, until the revenue laws of the United States were put into practical operation in California.[2]

§ 572. **Uniformity Clause as Applied to Territorial Acquisitions.**—The treaty of peace with Spain, whereunder Porto Rico and the Philippine Islands were ceded to the United States, was ratified on February 6, 1899, but the official proclamation of the President was not issued until April 11, 1899. On the following day, Congress enacted a law known as the Foraker Act,[3] declared in its title to be intended "temporarily to provide a revenue and civil government for Porto Rico," which established special tariff rates on merchandise going into Porto Rico from the United States or coming into the United States from Porto Rico, and provided further that these duties should be held as a separate fund for the benefit of the island and transferred to its local treasury.

Thus, before the treaty of peace, duties on goods from the United States into Porto Rico were collected by the military commander and by the President as commander in chief, and, as stated above, it was held that such duties were legally exacted under the war power. After the ratification of the treaty of peace and until the passage of the Foraker Act as above stated, the rates of duty established by the tariff laws of the United States were collected, both in the ports of the United States and in Porto Rico. The court held,[4] that, with the ratification of peace between the United States and Spain, the

[1] Fleming v. Page, 9 Howard 603, 13 L. Ed. 276 (1850).

[2] Cross v. Harrison, 16 Howard 164, 14 L. Ed. 889 (1853).

[3] 31 Stat. 77, c. 191.

[4] De Lima v. Bidwell, 182 U. S. 1, 45 L. Ed. 1041 (1901). Justices McKenna, Shiras, White and Gray dissenting.

island of Porto Rico ceased to be a foreign country, within the meaning of the tariff laws, and that the right to exact duties upon importations from Porto Rico to New York, and upon those from New York to Porto Rico, ceased at the same time.[1]

But this decision only applied to the *status* prior to the enactment of the Foraker Act, and on the question of the validity of this act, presented in the case of Downs v. Bidwell,[2] five of the judges concurred in holding the act valid, but they did not concur in the grounds of their decision, so that there is no opinion of the court as such.[3]

§ 573. **Insular Decisions.**—Justice Brown, who announced the decision of the court, in Downs v. Bidwell, although none of the other justices concurred in the reasoning of his opinion, maintained that the island of Porto Rico is not a part of the United States within the meaning of the uniformity clause of the Constitution; that the revenue clause of the Constitution applies to the States of the Union and not to the Territories; and that the practical interpretation put by Congress upon the Constitution had been continuous and uniform to the effect that the Constitution is applicable to territories acquired by conquest, only when and so far as Congress shall so direct. It followed, therefore, that the island of Porto Rico was a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clause of the Constitution. In the opinion, however, he disclaimed any intention of holding that the inhabitants of the Territories are subject to the unrestrained power of Congress, and suggested that there

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[1] Dooley v. United States, 182 U. S. 222, 45 L. Ed. 1074 (1901). Justices McKenna, Shiras, White and Gray dissented, holding that the duties collected both prior and subsequent to the treaty of peace were lawfully imposed.

[2] 182 U. S. 244, 45 L. Ed. 1088 (1901).

[3] Hon. Charles E. Littlefield, in an interesting paper upon the Insular Cases, read before the American Bar Association of 1901, page 242, says: "The Insular Cases, and the manner in which the results were reached, the incongruity of the results and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history."

is a clear distinction between such prohibitions of the Constitution as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only and throughout the United States and among the several States.

Justices White, McKenna and Shiras, concurring in the decision, maintained that Porto Rico occupied a position between that of a territory absolute and that of a domestic territory absolute; that Congress, in governing the Territories, is subject to the limitations of the Constitution, and that every provision of the Constitution which is applicable to the Territories is controlling therein. But territory acquired by the treaty-making power does not become "incorporated" in the United States without the concurring action of the legislative department of the government. Porto Rico, therefore, in the international sense, was not a foreign country, since it was subject to the sovereignty of, and was owned by, the United States; but it was foreign to the United States in the domestic sense, because the island had not been incorporated into the United States, but was merely "appurtenant thereto" as a possession.

Justice Gray, in a separate concurring opinion, said that of necessity there is a "transition period" in the incorporation of acquired territory, and that a system of duties during that period may be established temporarily by Congress, within the scope of its authority under the Constitution of the United States.

On the other hand, four judges, Chief Justice Fuller, and Justices Harlan, Brewer and Peckham, dissented *in toto*, holding that there is no constitutional basis for the theory of "incorporation," that all territory ceded to the United States becomes thereby an integral part of the Union and entitled to the protection of the Constitution, including the uniformity clause in regard to taxation.[1]

[1] The Reporter appends a footnote with the *syllabi* in this case, 182 U. S. 244, as follows: "In announcing the conclusion and judgment of the court in this case, Mr. Justice Brown delivered an opinion. Mr. Justice White delivered a concurring opinion which was also con-

The same principle was applied in a case decided at the following term involving fourteen diamond rings brought to San Francisco by a soldier returning from the Philippines.[1] These goods were brought to the United States, subsequent to the ratification of the treaty of peace, and before the act establishing a rate of duty between the United States and the Philippines. The court followed its opinion in the case of DeLima v. Bidwell, *supra*, and held that the duties were illegally exacted, Justice Brown concurring in a separate opinion, and Justices Gray, Shiras, White and McKenna dissenting, so that the same division in the court continued.

§ 574. **Tax Upon Exports.**—The taxing power of Congress is expressly limited by the prohibition[2] that no tax or duty shall be laid on articles exported from any State. This is reinforced by the following provision: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties, in another." The Constitution also prohibits[3] the States from levying any imposts or duties on imports or exports without the consent of Congress.[4] The term "imports and exports" in both of these clauses, limiting the taxing power of the States and national government, relates solely to foreign commerce.[5] It will be observed that the term "tax" in the first of these prohibitions

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curred in by Mr. Justice Shiras and Mr. Justice McKenna. Mr. Justice Gray also delivered a concurring opinion. The Chief Justice, Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham dissented. Thus it is seen that there is no opinion in which a majority of the court concurred. Under these circumstances I have, after consultation with Mr. Justice Brown, who announced the judgment, made head-notes of each of the sustaining opinions, and placed before each the names of the justices or justice who concurred in it."

[1] Fourteen Diamond Rings v. United States, 183 U. S. 177, 46 L. Ed. 138 (1902).

[2] Constitution, Art. I, Sec. 9, Par. 5.

[3] Art. I, Sec. 10, Par. 2.

[4] See *supra*, Ch. III.

[5] See *supra*, Ch. III.

appears as the alternative of "duty." It has been suggested that this language was probably intended to cover the case of a tax on an article which is *in transitu* to be exported, and the case of a duty upon the article when it becomes the subject of export.

The exemption only applies to property actually exported or *in transitu* to be exported, and the *intent* to export property is not sufficient. This question was raised in the Supreme Court in regard to the cotton tax levied during the Civil War. Its collection was resisted on the ground that it was necessarily a tax upon exports, as four-fifths of all the cotton raised in the country was in fact exported. Justice Miller in his lectures[1] says that the Supreme Court was equally divided upon this question, and it was not decided. It was subsequently held in other cases that the objection was not valid, and that the only property exempted from taxation under these provisions is that actually in process of exportation, which has begun its voyage or its preparation for the voyage.[2]

The exportation stamp required to be affixed to every package of tobacco intended for exportation before its removal from the factory was held constitutional,[3] the court saying that the stamp required was a means devised for the prevention of fraud by separating and identifying the tobacco intended for exportation. The excise tax laid on tobacco before its removal from the factory is not a duty on exports within the prohibition of the Constitution, even though the tobacco be intended for exportation.[4] In the case last cited the court cited the decision in Coe v. Errol,[5] where property intended for removal to another State was held taxable, the court saying that the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State.

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[1] Miller's Lectures, pp. 252 and 592.

[2] Coe v. Errol, 116 U. S. 517, *supra;* Turpin v. Burgess, 117 U. S. 504, *supra.*

[3] Pace v. Burgess, 92 U. S. 372, *supra.*

[4] Turpin v. Burgess, 117 U. S. 504, *supra.*

[5] *Supra,* Sec. 132.

§ 575. **Tax on Foreign Bills of Lading is Tax on Exports.**—The War Revenue Act of 1898, which has contributed so materially to the judicial discussion of the congressional taxing power, included a stamp tax on foreign bills of lading, and this was adjudged by the court, in an exhaustive opinion by Justice Brewer,[1] to be in substance and effect equivalent to a tax upon articles included in that bill of lading, and therefore a tax or duty upon exports, in conflict with the Constitution. It was strongly urged in this case that similar stamp duties had been enforced at different periods, since the foundation of the government, and never before been challenged. But the court replied that the practical construction of a statute, by those having actual charge of its execution, is to be relied upon only in cases of doubt; and that, when the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action although several times repeated and never before challenged. The court added at page 311:

"It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter that during the first period exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution."

It was urged by counsel that the same reasoning would invalidate the tonnage tax and stamp duties on manifests. The court said that, without deciding the question as to those taxes, there might be a valid difference as indicated by the decisions

[1] Fairbanks v. United States, 181 U. S. 283, 45 L. Ed. 862 (1901).

of the court with respect to interstate commerce. Thus a State cannot by license or otherwise impose a burden on the business of interstate commerce, but it can tax the vehicles and property employed in that business, so long and so far as they are property in the State. The court added: "This difference may have significance in respect to these other taxes. As heretofore said, we do not decide the question, but only make these suggestions to indicate that the matter has been considered."[1]

It was later held[2] that the stamp tax assessed under the War Revenue Act of 1898 upon chartered parties which were used exclusively for the carriage of cargo from State ports to foreign ports was also violative of the Constitution, and no less so when the goods were not on the vessel when the chartered party was made, where the charter related only to the exportation of cargo from State ports to foreign ports. The court said:

"The charters were for the exportation; they related to it exclusively; they served no other purpose. The tax on these chartered parties was in substance a tax on the exportation, and a tax on the exportation is a tax on the exports."

§ 576. **Porto Rican Tariff of 1900 Not Tax on Exports.**—An interesting case in the "Series of Insular Decisions" involved a consideration of the clause prohibiting a duty on exports, with reference to the duties levied under the Foraker Act of 1900 on goods shipped from New York to Porto Rico. It was strongly contended that, if Porto Rico is a "foreign country," these duties were clearly duties upon exports, and, on the other hand, if it is a domestic country and part of the United States, the duties were illegally exacted, because the act was an interference with the internal commerce of the country, and a prefer-

[1] Justices Harlan, Gray, White and McKenna dissented, saying that a stamp duty has had for centuries a well defined meaning, and that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by any one that such legislation infringes the constitutional rights of the citizen.

[2] United States v. Hvoslef, *et al.*, 237 U. S. 1, 59 L. Ed. 813 (1915), affirming 217 Fed. 680.

ence of one port thereof over another, in violation of the Constitution.[1] The court denied this contention by the same division as in the other Insular Cases.[2] Justice Brown, in his opinion, held that Porto Rico was not a foreign country within the meaning of the tariff act. The fact that the duties were not paid into the treasury of the United States, but held as a separate fund to be used for the purposes and benefit of Porto Rico, subject to repeal by the legislative assembly of that island, showed that the tax was not intended as a duty upon exports. But he added that he did not intend, by his opinion, to intimate that Congress could lay a tax upon the merchandise carried from one State into another.

Chief Justice Fuller, and Justices Harlan, Brewer and Peckham dissented, saying, page 175:

"Congress may lay local taxes in the territories, affecting persons and properties therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the territories, or from any State to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress as will enable it, under the guise of taxation to exclude the products of Porto Rico from the States as well as the products of the States from Porto Rico; and this notwithstanding it was held in De Lima v. Bidwell, 182 U. S. 1, that Porto Rico after the ratification of the treaty with Spain ceased to be foreign and became domestic territory."

§ 577. **Act Conferring Reciprocity Powers on President Sustained.**—The Tariff Act of 1890 gave authority to the President to equalize duties on imports, by suspending the free introduction of certain commodities, when satisfied that any country

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[1] Art. I, Sec. 9, Par. 5: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

[2] Dooley v. United States, 183 U. S. 151, 46 L. Ed. 128 (1902). There is an interesting critical review of the decisions in this case, and also of Woodruff v. Parham, *supra*, Sec. 110, in a paper by the late Edward B. Whitney, ex-Ass't Attorney-General of the United States, on the Insular Decisions in the Columbia Law Review of February, 1902.

producing such articles imposes duties or other exactions upon the agricultural or other products of the United States, which he may deem to be reciprocally unequal or unreasonable. All of the judges concurring held that, even if this reciprocal provision was invalid, it would not invalidate the other provisions of the act.[1] But it was held also, Chief Justice Fuller and Justice Lamar dissenting, that the provision was not open to the objection that it delegated legislative power to the President; that weight should be given to the fact that such powers had been given to the President with reference to trade and commerce since the foundation of the government; and that no discretion was allowed to the President, but it was made his duty to act when he ascertained the facts. The court said, at page 693:

"He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required, when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

§ 578. **Taxing Power of Congress with Reference to Treaty Power.**—It is no objection to the validity of any tax imposed by Act of Congress, that it violates provisions contained in the treaties of the government with other nations. This was deter-

[1] Field v. Clark, 143 U. S. 649, 36 L. Ed. 294 (1892).

mined by the court in the Head Money Cases,[1] and the same principle has been since declared. While a treaty is a law of the land, it has no superiority over an Act of Congress, and may therefore be repealed or modified by an act of a later date. It was said by the court, in the case cited, that there is nothing in its essential character or in the branches of the government by which a treaty is made, to give it any superior sanctity. The general principle was laid down, that so far as a treaty made by the United States with a foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such enactments as Congress may pass for its enforcement, modification or repeal.[2] This principle is, of course, applicable in the case of customs duties. The validity of the duty, as enacted by Congress, cannot be affected by the provisions of any prior treaty, so far as the courts are concerned.[3]

§ 579. **State Instrumentalities and Agencies Exempt from Federal Taxation.**—In the language of the Supreme Court in the Income Tax case of 1895. "As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State." It was the unanimous opinion of the justices in this case, and this was the only point on which there was a unanimous concurrence, that so much of the income tax law of 1894 as imposed a tax upon the income derived from the interest of bonds issued by a municipal corporation was a tax upon the

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[1] 112 U. S. 580, *supra.*

[2] As to the general principle involved, see Chinese Exclusion case, 130 U. S. 581, 32 L. Ed. 1068 (1889), and Fong You Ting v. U. S., 149 U. S. 721, 37 L. Ed. 905 (1893), and Whitney v. Robinson, 124 U. S. 190, 31 L. Ed. 386 (1888).

[3] As to effect upon tax or duty of a subsequent treaty inconsistent therewith, the Supreme Court said in the Cherokee Tobacco case, 11 Wall. 616, 20 L. Ed. 227 (1871): "A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." As to relation of treaty to legislation, see Marshall, J., in Foster v. Nelson, 2nd Peters 314, 7 L. Ed. 415 (1829).

power of the State in its instrumentalities to borrow money, and was consequently repugnant to the Constitution of the United States. "The Constitution," the court said, "contemplates the independent exercise by the nation and the States severally of their constitutional powers."

It had been before decided,[1] with reference to the Income Tax Law of 1864, that it was not competent for Congress to impose a tax upon the salary of a State judicial officer. The court ruled there that the case was controlled by the same principle as that of Dobbins v. Erie County,[2] deciding that a State cannot tax the salaries of officers of the United States; for, in respect to its reserved powers, the State is a sovereign as independent as the general government. It said, at page 127:

"It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"[3]

The Internal Revenue Act of 1864 provided that railroads and certain other companies should pay a five per cent tax on the amount of all interest paid on their bonds. The city of Baltimore held five million dollars of the bonds of the Baltimore & Ohio Railroad issued for a loan by the city to the railroad of its own bonds to that amount. It had already been decided by the Supreme Court that this was not a tax upon the cor-

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[1] Collector v. Day, 11 Wall. 113, 20 L. Ed. 122 (1871). See also United States v. Railroad Co., 17 Wall. 322, 21 L. Ed. 597 (1874), and Van Brocklin v. Tennessee, 117 U. S. 151, 178, 29 L. Ed. 145 (1886).

[2] *Supra*, Sec. 14.

[3] Justice Bradley dissented in this case, saying that the decision established a limitation of the power of taxation which he thought would be found very difficult to control.

porations on their own account, but they were used as a convenient means of collecting the tax from the creditor or stockholder upon whom this tax was really laid,[1] and it was therefore held that this tax could not be collected from the revenue of the city, as it was not within the power of Congress to tax the municipal income or property. The court in this case made a distinction between municipal revenues proper and revenues from property, which was held in trust by the city for charitable or other purposes, and said it was quite possible that the latter would be subject to taxation, but that the railroad loan was a proper municipal purpose for the benefit of the city as well as the railroad company, and the city's interest therein was therefore beyond the taxing power of Congress.[2]

Bonds required to be given to a State and city as a condition precedent to the issuance of a liquor license were exempt from the stamp tax requirements of the Act of 1878, as they were taken in the exercise of a function strictly belonging to the State and city in their ordinary governmental capacity and therefore held to come within the exemption clause of the act.[3]

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[1] Railroad Co. v. Jackson, 7 Wallace 262, *supra;* Haight v. Railroad Co., 6 Wallace 17, *supra.*

[2] United States v. Railroad Co., 17 Wallace 322, *supra.* Justice Bradley concurred on the special ground that Congress did not intend by the internal revenue laws to tax property belonging to the States of municipal corporations; and Justices Clifford and Miller dissented, holding that private property owned by a municipal corporation merely in a proprietary right and not for governmental purposes is not entitled to exemption. It was held by the U. S. Circuit Court in Georgia, Georgia v. Atkins, 1 Abbott (U. S.) 22 (1866), that the word "corporation" in the Revenue Act of 1864, declaring that every person or corporation owning a railroad should pay a tax, did not include the Western & Atlantic Railroad owned by the State of Georgia, and managed by the State agents, and the profits from which were part of the revenue of the State.

[3] Ambrosini v. United States, 187 U. S. 1, 47 L. Ed. 49 (1902), reversing 105 Fed. 239.

See also Bettman v. Warwick, 108 Fed. 46, C. C. A. 6th Circuit, 47 C. C. A. 185 (1901), holding that under the same act a stamp could be required on the bond of a Notary Public. It was held in several State cases that the requirement that instruments should not be admissible

§ 580. **Exemption Does Not Extend to the State's Assumption of Business of Liquor Selling.**—Persons employed by the State of South Carolina in selling liquor were not relieved from liability for the internal revenue tax by the fact that they had no interest in the profits of the business and were simply the agents of the State, which, in the exercise of its sovereign power, had taken charge of the business of selling intoxicating liquors.[1] The court said that the exemption of State agencies from the taxing power of the government necessarily grew out of the dual form of government, and it did not extend to the assumption by the State of a private business, that is, the exemption of State agents and instrumentalities from national taxation was limited to those of a governmental character, and did not extend to those which are used by the State in the carrying out of an ordinary private business. The court therefore concluded that the license taxes charged by the Federal government upon persons selling liquor were not invalidated by the fact that they were the agents of the State which had itself engaged in that business.

§ 581. **Federal Succession Tax on Bequests to Municipality.**—The succession tax imposed under the War Tax Bill of June, 1898, was adjudged lawfully levied upon a bequest to a municipality for public purposes, that is, for maintaining, improving and beautifying a public park, since the tax, collected from the

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in evidence unless stamped applied only to Federal courts, Congress having no power to control evidence in the State courts. Garland v. Gaines, 73 Conn. 662 (1901); Southern Ins. Co. v. Estes, 106 Tenn. 472, and 52 L. R. A. 915 (1901). In Minnesota it was held, Spoon v. Frambach, 83 Minn. 301 (1901), that the unstamped paper would be received in evidence unless the omission of the stamp was shown to be fraudulent.

[1] South Carolina v. United States, 199 U. S. 437, 50 L. Ed. 261 (1905), affirming 39 St. of Cl. 257.

Justices White, Peckham and McKenna dissenting, saying that as the State of South Carolina had complete and absolute power over the liquor traffic and could exert in dealing with that subject to methods and instrumentalities as were deemed best. The United States was without authority to tax the agencies which the State called in to be for the purpose of dealing with the liquor traffic.

property while in the hands of the executor, who was required by Sec. 30 of that act to liquidate it "before payment and distribution to the legatees," could not be regarded as a tax upon the municipality, although it might operate incidentally to reduce the bequest by the amount of the tax.[1] The court said that this case was to a certain extent the converse of that of the United States v. Perkins,[2] wherein the State taxes upon bequests of the Federal government had been sustained. The court said that as Congress had the power to tax succession, and the States had the same power, and such power extended to bequests to the United States, it would seem to follow logically that Congress had the same power to tax the transmission of property by legacy to States or their municipalities.

§ 582. **State Securities are Not Exempt from Federal Inheritance Taxes.**—The exemption of State agencies and instrumentalities from Federal taxation does not extend to the exemption of State and municipal securities from a Federal inheritance tax. These last are subject to Federal taxation on the same principle that Federal securities are subject to a State inheritance tax. The tax is upon the right of inheritance, and not upon the property inherited.[3]

§ 583. **Federal Securities Subject to Federal Inheritance Taxes.**—It was also held, under the War Revenue Act of 1898,[4] that, as a State inheritance tax may lawfully be measured by the value or amount of the legacy, even if United States bonds are included in the legacy, the reasoning that justifies such a principle must, when applied to the case of a Federal inheritance tax upon the same legacy, lead to the same conclusion. The court declined to consider the question whether the United States, in the exercise of the power of taxation, can be estopped by a contract that such power should not be exercised, as in this

[1] Snyder v. Bettman, 190 U. S. 249, 47 L. Ed. 1035 (1903). Justices White, Fuller and Peckham dissenting.

[2] *Supra*, Sec. 35.

[3] Knowlton v. Moore, *supra*.

[4] Murdock v. Ward, 178 U. S. 139, 44 L. Ed. 1009 (1900).

case the tax was not levied upon the bonds which had been exempted from taxation, State and Federal, but upon the right of inheritance.[1]

§ 584. **Taxing Power of Congress and State Authority.**— The relation to State authority of the taxing power of Congress was also considered in the cases involving the War Revenue Act of 1898, *supra*. It was claimed that the inheritance tax in that act was invalid,[2] since the transmission of property by death was exclusively subject to the legislative authority of the several States. But the court said that the tax was imposed upon the transmission or receipt of the inheritance or legacy, and not upon the right existing in the State to regulate that transmission or receipt. It was urged that the power to tax inheritances involves the power to destroy them. But that consideration, said the court, had no application to a lawful tax, because on that reasoning every such tax would become unlawful, and therefore none whatever could be levied. It added:

"Under our constitutional system both the national and the State governments moving in their respective orbits have a common authority to tax many and diverse objects. But this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did, there would practically be an end of the dual system of government which the Constitution established."

§ 585. **Taxing Power of Congress and State Franchises.**— The lawful exercise of the taxing power by Congress may destroy a business or franchise exercised under State authority. This was illustrated by the Act of Congress imposing a tax of ten per cent upon the notes of State banks used for circulation

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[1] The court said, by Justice Miller, in Mitchell v. Clark, 110 U. S. 643, 28 L. Ed. 279 (1884): "It is no answer to this to say that it interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this, as it does the States, and where the question of the power of Congress arises, as in the legal tender cases, and in bankruptcy cases, it does not depend upon the incidental effect of its exercise on contracts, but on the existence of the power itself."

[2] Knowlton v. Moore, *supra*.

after the 1st of August, 1866. The purpose, substantially admitted, was to drive the notes from circulation, so as to open the means for circulating the notes of the national banks organized by Congress. This act was said by Justice Miller[1] to be a forcible illustration of the famous saying of Chief Justice Marshall: "The power to tax is the power to destroy." It was sustained by the Supreme Court.[2] The argument was advanced that the tax was direct and therefore should have been apportioned to the States, and that it impaired a franchise granted by them, but the court said, in an opinion by Chief Justice Chase, that these objections were untenable; that it was a duty or excise tax, and not direct; that franchises granted by the State are subject to taxation like other property, and even if the tax was excessive and indicative of a purpose to destroy the franchise, that was a question for Congress and not for the court. But apart from this, Congress having undertaken to provide a currency for the whole country, it could constitutionally secure the benefit of it to the people by appropriate legislation. It could, therefore, by suitable enactments, restrain the circulation, as money, of any notes not issued under its own authority.

The act provided that this tax should be paid by any bank on the notes of any town, city or municipal corporation paid out by it, and the court enforced the collection of the tax against the National Bank of Little Rock on account of notes issued by the city of Little Rock and paid out by the bank. The court said[3] that the tax was not laid on the obligation, but on its use in a particular way; that a municipality could not, against the law of Congress, put its notes in circulation as money, and that the bank which helped to keep up the use by paying them out,

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[1] In Loan Assn. v. Topeka, 20 Wall. 1. c. 663, *supra*, Sec. 380.

[2] Veazie Bank v. Fennell, 8 Wall. 533, 19 L. Ed. 482 (1868). Justices Nelson and Davis dissented, holding that, while Congress had power to tax the property of the banks, the tax in question was really one upon the powers and faculties of the State to create the banks, and the decision in fact struck at this latter, which was essential to the sovereignty of the States.

[3] National Bank v. United States, 101 U. S. 1, 25 L. Ed. 979 (1880).

that is, employing them as the equivalent of money in discharging its obligations, was taxed for what it did. "The taxation was no doubt intended to destroy the use. But that, as has just been seen, Congress had the power to do."

§ 586. **Taxing Power of Congress and Police Power of State.** —While Congress may thus tax any property or franchise enjoyed under State authority, the exercise of its power of taxation can give no rights as against the lawful exercise of the police power of the State. In other words, Congress cannot authorize a trade or business within a State where it is prohibited in order to tax it. A license granted by Congress therefore may prohibit the carrying on of the business before payment of the tax, but this is only a mode of enforcing the payment. Such licenses, so far as they relate to trade within the State limits, give no authority to carry on the business, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade, if the taxes are paid. It follows, therefore, that a party failing to take out a license thus required may be indicted therefor. On the other hand, the possession of a license from the Federal government to sell liquors is no bar to an indictment under a State law prohibiting such sales.[1]

This subject was also considered by the Supreme Court in reference to the Act of Congress of August 2, 1886, imposing special taxes upon manufacturers of oleomargarine, as well as upon the wholesale and retail dealers in that compound. The State of Massachusetts enacted a law prohibiting the manufac-

[1] McGuire v. Commonwealth, 3 Wallace 387, 18 L. Ed. 164 (1866); License Tax Cases, 5 Wall. 462, *supra;* Pervear v. Commonwealth, 5 Wall. 475, 18 L. Ed. 608 (1867). It was held in Massachusetts, Commonwealth v. Crane, 158 Mass. 218, that a statute requiring everyone selling oleomargarine from a vehicle to put on both sides of the vehicle the sign "Licensed to sell oleomargarine," was not in conflict with the Act of Congress of August 2d, 1886, taxing and licensing the sale of oleomargarine. The court said that defendant's possession of a license under the Act of Congress afforded him no immunity from the police control of the State.

ture or sale of oleomargarine in imitation of butter. It was claimed that this latter act was an interference with interstate commerce, as Congress had legislated fully on the subject. But the Supreme Court said[1] that the Act of Congress was not intended as a regulation of commerce between the States, and that the taxes prescribed by that act were imposed for national purposes. Their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State whose law forbade such manufacture or sale, or to disregard any regulation which the State might lawfully prescribe in reference to that act.

§ 587. **Municipal Corporations Subject to Internal Revenue Taxation.**—A municipality which engages in the business of distilling spirits is not exempt from the tax levied upon that business by the United States, and it is immaterial, so far as the liability to the tax is concerned, that it had no lawful authority to engage therein. Salt Lake City, in what was then the Territory of Utah, set up this claim in a suit against the collector to recover the amount of taxes alleged to have been illegally exacted. But the court, in an interesting opinion by Justice Miller, said:[2]

"A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the govern-

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[1] Plumley v. Massachusetts, 155 U. S. 461, 39 L. Ed. 223 (1895). It was also held in this case that the doctrine of Leisy v. Hardin, 135 U. S. 100, *supra*, Sec. 116, did not justify the contention that the State was powerless to prevent the sale of deceitful imitations of articles of food in general use among the people. On this point Chief Justice Fuller and Justices Field and Brewer dissented, denying that a State can exclude from commerce legitimate objects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities.

[2] Salt Lake City v. Hollister, 118 U. S. 256, l. c. p. 262, 30 L. Ed. 176 (1887).

ment on such business or transaction by whomsoever conducted."

§ 588. **Diminution of Salaries by Taxation.**—The Constitution of the United States provides that the compensation of the judges both of the Supreme and inferior Federal courts shall not be diminished during their continuance in office,[1] and that the compensation of the President shall neither be increased nor diminished during the period for which he shall have been elected.[2] An income tax was imposed during the Civil War upon the salaries of both the judges and the President, on the ground that it did not diminish their salaries, but only imposed a tax, and hence did not violate the constitutional provisions. But Chief Justice Taney, on February 16, 1863, in behalf of the court, in a letter to the Secretary of the Treasury, protested that such exaction, although called an income tax, was nevertheless a diminution of salaries, in violation of the Constitution. The matter was not acted on at the time, but subsequently, on October 23, 1869, the Attorney-General of the United States, Hon. E. R. Hoar, in a written opinion, advised the Secretary of the Treasury to the same effect.[3] The amounts collected were afterwards returned. The opinion of the Attorney-General advised that, under the doctrine of Dobbins v. Erie County,[4] the compensation of an officer of the United States fixed by a law of Congress is not subject to taxation under State authority, because the effect of such a tax would be to diminish the compensation which the officer is by law entitled to receive, and that, as Congress is prohibited by the Constitution from diminishing the salaries paid the President and the judges during their respective terms of office, it can no more diminish such salaries by imposing excise taxes or duties thereon and deducting the amount from them, than can a State make such deductions from the salary of an officer of the United

[1] Art. III, Sec. 1.

[2] Art. II, Sec. 1, Par. 7.

[3] Opinions of Attorney-Generals, Vol. 13, p. 161; see also Mis. Docs., No. 214, 53d Congress, 2d Session, containing a copy of the letter of Chief Justice Taney.

[4] *Supra*, Sec. 14.

States. The tax operates as a direct diminution of the compensation of the officer in either case.[1]

§ 589. **Progressive Taxation.**—It was strongly urged in Knowlton v. Moore, *supra,* that the *progressive* feature of the inheritance tax of 1898 was invalid, and so repugnant to fundamental principles of equality and justice that the law should be held void, even though it transgressed no express limitation of the Constitution. The court had already held that the progressive feature in the inheritance tax of Illinois was not violative of the Fourteenth Amendment. Such provisions, however, had been held invalid by some of the State courts,[2] as violating the uniformity required by their respective constitutions. The court declined to intimate in the opinion as to whether it had the right to exercise the power thus invoked, of declaring void a statute not in conflict with any express provision of the Constitution, and said that the facts in the case before them did not justify them in declaring the tax in question invalid. It said that some authoritative thinkers and a number of economic writers contend that a progressive tax is more just and equal than a proportionate one, and that, in the absence of constitutional provisions, the question whether it is or not is legislative and not judicial. In answer to a suggestion of the grave consequences of recognizing the right to levy progressive taxes, the court said:

"If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious."[3]

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[1] See Miller's Lectures on Const., p. 247.

[2] *Supra,* Sec. 516.

[3] Justice Brewer dissented from so much of the opinion as held that a progressive rate of tax can be validly imposed, adhering to the views expressed by him in the Illinois case, *supra,* Sec. 517.

§ 590. **Scope of Federal Taxing Power.**—The great scope of the Federal taxing power is illustrated in the decision of the court sustaining the provision of the Spanish War Revenue Act of 1898, imposing a tax upon sales made upon boards of trade or exchanges.[1] This tax was upon any sales or agreements of sale at any exchange or board of trade, or other similar place, either for present or future delivery, and required a memorandum to be delivered by the seller to the buyer in every such case, to which should be affixed a stamp or stamps equal in value to the amount of the tax. It was claimed that this tax was an illegal interference with the internal commerce of the States; that Congress had no power to require a written memorandum to be made of transactions within the State, so that a stamp might be placed thereon; that there was no proper basis for a privilege tax, and that it was in effect a direct tax. But the court held that none of these objections were well founded. It said that this was not a direct tax in the constitutional sense, using the language already quoted.[2] It was not a tax on the property, but on the privilege, or for the facilities afforded at exchanges or boards of trade for the transaction of business, and was therefore in the nature of a duty or excise. It was not lacking in uniformity either in the intrinsic or geographical sense, and there was no legal interference with commerce in the State.

And the court added, p. 516:

"In searching for proper subjects of taxation to raise moneys for the support of the government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties to the same kind of a transaction. Having the power to recognize these various facts, it

[1] Nicol v. Ames, 173 U. S. 509, 43 L. Ed. 786 (1899).

[2] *Supra*, Sec. 565.

must also follow that Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on."

§ 591. **Taxing Power of Congress in Relation to Interstate Commerce.**—The power of Congress over interstate commerce is declared in the same clause of the Constitution with the power over foreign commerce. Congress is given power to regulate commerce with foreign nations and among the several States and with the Indian tribes; and this power, in the language of the Supreme Court, acknowledges no limitations other than those prescribed in the Constitution.[1] The Supreme Court in several cases has declared that Congress has the same power over interstate commerce as over foreign commerce.[2] This language, however, was used in cases which involved State interference with interstate commerce, and in connection with the assertion that the States can no more interfere with such commerce than with foreign commerce. On the other hand, it has been argued that the power over domestic commerce is not identical with the power over commerce with foreign nations and with the Indians, for the United States deals with a foreign nation as one sovereign with another; and that the right to interdict foreign commerce which may adhere in the power to regulate commerce with foreign or dependent nations, cannot be attributed by analogy to the power to regulate our own.[3]

Comprehensive as is the commerce power in the Constitution, the taxing power is clearly distinct and is expressly limited by the qualifications and exceptions stated. Thus the Constitution provides[4] that no preference shall be given by any regulation

[1] Leisy v. Hardin, 135 U. S. 108, *supra*, Sec. 116.

[2] Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. Ed. 649 (1891); Pittsburgh Co. v. Bates, 156 U. S. 577, 587, 39 L. Ed. 538 (1895); Brown v. Houston, 114 U. S. 630, 29 L. Ed. 257 (1895). See also Champion v. Ames, 188 U. S. 321, 47 L. Ed. 492 (1903), and Francis v. U. S., 188 U. S. 375, 47 L. Ed. 508 (1903), reversing 106 Fed. 896.

[3] Randolph on Law and Policy of Annexation, pp. 94 to 98.

[4] Art. I, Sec. 9, Par. 5.

of commerce or revenue to the ports of one State over those of another.

Congress, in levying taxes under the constitutional grant, is not restrained, as are the States, from interfering with interstate commerce. Thus it may levy, subject to the requirement of geographical uniformity, indirect taxes or excises on the subjects or facilities of commerce, as in the stamp duties levied upon the bills of lading of public carriers and telegraph messages. This the States cannot do. Under the rule laid down, however, in the Income Tax cases of 1895, as reaffirmed in Knowlton v. Moore, *supra*, Congress cannot tax directly any property, whether of individuals or corporations, solely with reference to the general ownership of such property, except upon the rule of apportionment; and this requirement of apportionment would, under this rule, apply to the direct taxation of property employed in interstate commerce.

The question was discussed, though not decided, in Dooley v. United States,[1] whether Congress could lay an export tax upon the merchandise carried from one State to another. Justice Brown said that the question was not involved in the case, but intimated that, while such a tax is not forbidden by express words in the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without violation of the requirement that all duties, imposts and excises shall be uniform throughout the United States. Justice White, in his concurring opinion, page 165, said:

"Certainly the argument cannot be that because a power has been conferred upon Congress by the Constitution to levy a tax on foreign commerce, therefore the Constitution has taken away from Congress power to tax even indirectly domestic commerce."

He quoted the language of Chief Justice Chase in the License Tax Cases,[2] that the taxing power of Congress, as limited by the Constitution, and thus only, reaches every subject, and may be exercised at discretion, adding:

[1] 183 U. S. 151, *supra*.

[2] 5 Wallace 462, p. 471, *supra*

"Of course, the Constitution contemplates freedom of commerce between the States, but it also confers upon Congress the powers of taxation to which I have referred."

The dissenting opinion, by Justices Fuller, Peckham, Brewer and Harlan, said that the power to regulate interstate commerce was granted in order that trade between the States might be left free from discriminating legislation, and not to impart the power to create antagonistic relations between them. If the power of regulation was absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure could be set at naught by a legislative body created by that instrument. It was also said that

"Congress may lay local taxes on territories, affecting the persons or property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the Territories, or from any State to foreign countries, or grant a power in that regard which it does not possess."[1]

§ 592. **Congress May Increase Excise as Well as Property Tax.**—The power of taxation is not exhausted when once exercised. Taxes are not debts in the sense that having been once established and paid all further liability of the individual to the government ceases. Thus the Supreme Court said:[2]

"The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order 'to provide for the common defense' and 'promote the general welfare.' . . . Taxation may run *pari passu* with expenditure. . . . Courts may not in this respect revise the action of Congress." If emergencies arise calling for loan or tax, and Congress "determines in whole or in part on a tax, that means an increase in the existing rate or perhaps in the subjects of taxation, and the judgment of Congress in respect thereto is not subject to judicial challenge."

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[1] See also remarks of Justice Brewer in Fairbank v. U. S., *supra*, Sec. 575.

[2] Patton v. Brady, 184 U. S. 608, 619, 46 L. Ed. 713 (1902).

This principle was applied by the court to the increased excise tax upon manufactured tobacco. The court said that not only may a general tax be imposed upon property, which has once paid an excise tax, but an excise tax may be increased, at least while the property is held for sale, and before it has passed into the hands of the consumer. The exercise of the power is limited solely by the rule of geographical uniformity.

§ 593. **Taxation of Property of Non-resident Aliens.**—The taxing power of Congress extends to all the subjects of taxation within its jurisdiction, and therefore includes, if Congress deems proper, the property of alien non-residents, which is localized within the jurisdiction. Thus, under the Internal Revenue Act of 1866, a tax was imposed on alien non-resident holders of securities of domestic railroad companies. The court had expressed a doubt as to the validity of such a tax,[1] but it was held that the tax levied by the Act of 1866 was essentially an excise on the business of that class of corporations and properly collectible from the company. The tax was really levied on the corporation which paid the interest, not on the bondholders who received it, and it was therefore immaterial where the latter resided.[2] As in the case of State taxation, it is a question of construction and not of power, whether such property of alien non-residents is subjected to taxation. Thus the Inheritance Tax Law of 1898 was construed as not applying to the estates in this country of decedents domiciled abroad, although the Supreme Court held that it is within the power of Congress to impose an inheritance tax upon property in this country, no matter where it is owned or transmitted, provided the intention to tax is expressed in clear and unambiguous language.[3] The same ruling was made in a case where the will of

[1] Railroad Co. v. Jackson, 7 Wall. 262, *supra*.

[2] Railroad Co. v. Collector, 100 U. S. 595, 25 L. Ed. 647 (1880), and United States v. Erie Ry. Co., 106 U. S. 327, *supra*, Justice Field dissenting.

[3] Eidman v. Martinez, 184 U. S. 578, *supra*. The opinion in this case contains a careful review of the decisions in England and in the different States of this country, on the subject of the application of in-

the alien was actually executed in this country, the court holding that Congress had not expressed the intention to subject such estates to taxation.[1]

§ 594. **Taxation of Property of Residents Invested Abroad.** —The same principle, that the sovereign power of the taxing authority extends over all subjects of taxation within its jurisdiction, which was enforced in Kirtland v. Hotchkiss, an analogous case of State taxation, where the court held that a State can tax her resident citizens for debts held by them against non-residents and secured by a mortgage on property in another State,[2] was applied to a tax levied by Congress upon the property of residents located in another jurisdiction. Thus, in a suit[3] brought by a bank in California to recover taxes alleged to have been illegally levied and collected on its capital, because part of the capital was invested in foreign countries, the court said that the case was controlled by the principle announced in Kirtland v. Hotchkiss. The bank was subject to the sovereign power of the United States and a proper object of taxation, saying:

"The investments abroad are still the property of the bank and part of its capital. In the absence of any averments to the contrary, we must presume they were such as banks usually make in doing a banking business, and that their legal *situs* was at the home office of the corporation. We need not consider, therefore, whether, if they had been made in fixed property subject exclusively to another jurisdiction, a different rule would apply."

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heritance tax laws to property, within the jurisdiction of decedents domiciled abroad. See also United States v. Hunnewell, 13 Fed. 617 (1882). Under the inheritance on "estate" tax provisions of Revenue Act of September 8, 1916, the estates in this country of non-residents were specifically subjected to the tax, and stocks of non-residents in domestic companies are declared to be property within the United States under the Act.

[1] Moore v. Ruckgaber, 184 U. S. 593, 46 L. Ed. 705 (1902).

[2] Kirtland v. Hotchkiss, 100 U. S. 491, *supra*, Sec. 483.

[3] Sedgwick v. Bank, 104 U. S. 111, 26 L. Ed. 703 (1882).

§ 595. **Taxing Power of Congress Over Territories.**—The *status* of the Territories with reference to the uniformity clause of the Constitution was discussed in the Insular Decisions, and the judges concurred in the opinion, though on different grounds, that "incorporated" Territories of the Union are entitled to all the privileges of the Constitution, including the protection of the uniformity clause in Federal taxation.[1]

The power of Congress over the Territories is general and plenary, arising from the right to acquire the territory itself, and the power given by the Constitution to make all needful rules and regulations restricting territory belonging to the United States.[2] Congress, in the exercise of its power to organize and govern the territories, combines Federal and State authority. It may not only abrogate laws of the Territorial legislature, but it may itself legislate directly for the local government. It may make a void act of the Territory valid and a valid act void. It was said by the Supreme Court through Justice Bradley in the Mormon Church case, page 44:

"Doubtless Congress, in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

In the organization of the incorporated Territories, Congress has conferred the power of local taxation. Under the general territorial system, as expressed in the various organic acts, the power of local taxation in the Territorial governments is absolute, save as restricted by the constitutional or congressional enactments. Thus, it was held that the Territories of the United States have the power of taxing the national bank shares to the same extent as the States, that is, equally with other moneyed

[1] Sec. 573, *supra*. In the opinion of Mr. Justice Brown, this was based upon the action of Congress in extending the Constitution and laws of the United States over the territories.

[2] Mormon Church v. United States, 136 U. S. 1, 34 L. Ed. 229 (1900).

capital, although "Territories" are not mentioned in the National Banking Act. The court said that the word "State" in national legislation of the character of the National Banking Act should be construed as including Territories.[1] Congress therefore has plenary power to establish such system of local taxation in the Territories, directly or through the authority given to the Territorial legislature, as it deems proper; but duties, imposts and excises, levied for national purposes by the United States, must be uniform over the organized and incorporated Territories as well as in the States.

§ 596. **Classification in Territorial Taxation of Indian Reservation.**—Although the Organic Act organizing the Territory of Oklahoma prohibited discrimination in taxation and required that all property should be taxed in proportion to its value, there was no unlawful discrimination in the laws of Oklahoma providing a different form of taxation for property in an Indian reservation attached to a county in the Territory from that enforced in other parts of the Territory.[2] The court said that the general rule that there should be a uniformity of the same kind of property in the same taxing district rested on the assumption that in such district the circumstances regarding the property to be taxed were ordinarily the same, but where the difference was deep and radical, as between an Indian reservation and other lands in the county to which it was attached for judicial purposes, such differences could properly be considered by the legislative body, and the Supreme Court of the Territory was therefore sustained.

The Organic Act of a Territory supersedes a prior Indian treaty and the Territorial tax laws enacted thereunder have a valid operation over property lying within Indian reservations.[3]

§ 597. **Taxing Power in Case of "Unincorporated" Territories.**—What was said in Sec. 595, *supra,* with reference to

[1] Talbott v. Silver Bow County, 139 U. S. 438, 35 L. Ed. 210 (1891).

[2] Foster v. Pryor, 189 U. S. 325, 47 L. Ed. 855 (1903), affirming 66 Pac. 348.

[3] Thomas v. Gay, 169 U. S. 264, 42 L. Ed. 740 (1898).

the taxing power of Congress in case of organized contiguous Territories in the United States obviously applies with even greater force in case of the non-contiguous "unincorporated" territorial possessions of the United States, including those whose *status* was discussed in the Insular decisions. As the organized contiguous territories have become States of the Union, the term "Territories" now includes (other than the District of Columbia and the Panama Zone) only Alaska and the so-called Insular possessions. The power of Congress is clearly general and plenary to make all needful rules and regulations for the government of these territorial possessions, as it exercises both State and Federal authority. Thus it has legislated directly in the imposition of taxes and exempting property, and has also delegated the power of taxation to the territorial legislatures which it has authorized to be organized.

This power of Congress is illustrated by its exercise in the General Revenue Act of September 8, 1916, wherein it is provided in title[1] (the Income Tax) that the word "State" or "United States" when used in that title shall be construed to include any territory in the District of Columbia, Porto Rico and the Philippine Islands, when such construction is necessary to carry out its provisions. And it is also provided[2] that the provisions of that Title I should extend to Porto Rico and Philippine Islands, and that all revenues collected in Porto Rico and Philippine Islands shall accrue to the general government thereof. In Title II[3] (the Estate or Inheritance Tax) the term "United States" is declared to mean only the States, the District of Columbia and Territories of Alaska and Hawaii, and the same provision is made in Title III as to the Munition Manufacturers' Tax.[4]

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[1] Sec. 23, *infra*, appendix.

[2] Sec. 200, *infra*, appendix.

[3] Sec. 300, *infra*, appendix.

[4] The general taxing system prevailing in Alaska and the Island possessions is as follows:

ALASKA. In the case of Alaska, see Act of July 18, 1914, authorizing additional tax of 1% on gross income of railroads on business

§ 598. **Taxation in District of Columbia.**—The same general principle applies to congressional taxation in the District of Columbia. Congress is vested by the Constitution with ex-

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done in Alaska to be paid to Alaska for general territorial purposes. See also Act of June 26, 1906, regulating a license tax on the business of canning and curing fish; also Act of August 24, 1912, regulating the exercise of the taxing power by the Legislative Assembly. The Legislature of Alaska imposed a poll tax upon each male person between twenty-one and fifty years of age. Domestic and foreign corporations pay a license tax of fifteen dollars per annum, and licenses and taxes are imposed on a number of lines of business. There is also a general property tax.

As to the incorporation of Alaska, though not contiguous, in the United States, see Rasmussen v. U. S. 197 U. S. 516, 49 L. Ed. 862 (1905), holding that in a jury trial for misdemeanor in Alaska there was a right to a common law jury of twelve.

Hawaii. In the case of Hawaii, by Act of April 30, 1900, the legislative power was declared to extend to all rightful subjects of legislation not consistent with the constitution and laws of the United States locally applicable. There was no express limitation in the matter of taxation. The Legislative Assembly imposed an *ad valorem* tax on all property with an exemption of $300.00, also an annual poll tax of one dollar, and sundry license taxes.

The income tax enacted in 1901, was sustained by the Circuit Court of Appeals for the Ninth Circuit in Peacock v. Pratt, C. C. A. 9th Circuit (1903), 121 Fed. 772, affirming 13 Hawaii 590, the court holding that the income tax law was within the lawful powers of the territory, and that the requirement of uniformity in Sec. 1, Art. I of the Constitution had no application to the power of taxation of territorial legislation. It was held that the exemption of incomes under $1000.00 was not illegal; and that the failure to exempt the salaries of judicial officers and compelling taxpayers to furnish evidence against themselves would not invalidate the whole law; and the injunction was therefore dismissed.

By Act of April 30, 1900, all persons who were citizens of the Republic of Hawaii on August 12, 1898, were declared to be citizens of the United States and citizens of the Territory of Hawaii; and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations which were not locally inapplicable, were declared to have the same force and effect within the territory as elsewhere within the United States.

Porto Rico. Under the Act of April 12, 1900, the Island of Porto Rico and adjacent islands were included in the civil government pro-

clusive legislative authority over the District, but, irrespective of this grant of power, as was decided in Loughborough v.

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vided by that Act. Whenever the Legislative Assembly put in operation a system of local taxation to meet the necessity of the government, all tariff duties between Porto Rico and the United States were to cease, and the statutory laws of the United States not locally inapplicable, except as otherwise provided, had the same force and effect in Porto Rico as in the United States, except the Internal Revenue laws. By this act, all the inhabitants who were Spanish subjects at the time of the annexation, and their children born subsequent thereto, were declared to be citizens of Porto Rico, and, as such, entitled to the protection of the United States; and they, together with such citizens of the United States as may reside in Porto Rico, constitute a body politic under the name of "The People of Porto Rico" with governmental powers under that name.

The Legislative Assembly of Porto Rico has enacted a system of taxation, including inheritance tax, where the property passing amounts to $200.00 or more, the limit being $500.00 in the case of a father, child or grandchild, and the rate of tax varying according to amount of inheritance and the degree of relationship. There is a general *ad valorem* tax, and corporations are assessed in the same manner as individuals. There is also a special tax on insurance companies.

Philippine Islands. Under the Act of July 1, 1902, all inhabitants of the Philippine Islands who were Spanish subjects at the time of the accession, are held to be citizens of the Philippine Islands, except those who are entitled to preserve their allegiance to Spain. The rule of taxation on the Islands was declared to be uniform. An extensive degree of self-government was provided by the Act of August 29, 1916, in which the uniform rule of taxation was again declared. The revenue of the Islands is partly derived from customs duties from a system of internal revenue taxes, including what is termed a cedula or what was in effect a poll tax, the stamp tax upon documents and papers, and privilege taxes upon business and occupations. Governor-General Harrison says in his Annual Report of 1916:

"It is noticeable that in imposing these new taxes, the Philippine legislature followed the correct principles in levying taxes upon luxuries and amusements, and upon commerce, so that those best able should bear the necessary burden." There is also a real estate tax, subject, however, to extended exemption of government and church lands, and not including certain departments; and the exemptions include machinery used for industrial, agricultural, or manufacturing purposes, fruit trees and bamboo plants. The Governor-General is em-

Blake,[1] the District as well as the Territories are included in the grant of the general taxing power. The sovereign power over the District, therefore, is lodged, not with the corporation created by Congress for its administration, but in the government of the United States. Its essential character as a municipal corporation has not been changed by the Act of Congress abolishing the local legislature and providing for local administration through appointed officials.[2] The court said that it was not necessary to a municipal government or to municipal responsibility that the officers should be elected by the people,

"All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them."

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powered to remit the tax when he deems the public interest requires, in any province.

The Inheritance Tax of one per centum when the surviving spouse of child is a beneficiary if the estate, does not exceed 50,000 pesos; one and one-half per centum if the estate is between 50,000 and 250,000 pesos; two and one-half, between 250,000 and 500,000 pesos; and four per centum if in excess of that amount. Where the parents, brothers or sisters, are beneficiaries the taxes increase one hundred per centum; where other relatives are beneficiaries, taxes increase to two hundred per centum; strangers, three hundred per centum. Share of wife and child are exempt if not in excess of 3,000 pesos.

This Act took effect July 1, 1916.

There is also a general tax upon sponges, and on the gathering of moluska (August 29, 1916).

By Act of August 29, 1916, c. 416, Sec. 5, the Statutory Laws of the United States thereafter enacted shall not apply to the Philippine Islands, except when they specifically so provide or it is so provided in the act.

There is in force in the Islands the Philippine Tariff Act of Congress of 1909, the Income Tax law of Congress, approved September 8, 1916, *supra*, and the Harrison Narcotic Act.

Neither the provisions of the Inheritance or Estate Tax provisions Act of September 8, 1916, nor the Munitions Manufacturers' Tax are in force in the Islands.

[1] *Supra*, Sec. 568.

[2] Metropolitan Railroad v. District of Columbia, 132 U. S. 1, 33 L. Ed. 231 (1899).

Congress, however, is the legal legislature over this municipality, exercises over it full and entire jurisdiction both of a political and municipal nature, and may legislate with reference to people and property therein as may the legislature of a State over any of its subordinate municipalities. Thus it is within the constitutional power of Congress to tax different classes of property in the District at different rates. The Supreme Court held valid an act which taxed lands within the District outside of the cities of Washington and Georgetown, used solely for agricultural purposes, at $1.25 on the $100 and all other real and personal property in the District, not expressly exempted, at $1.50 on the $100, saying that, in the exercise of this power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property for taxation, or may tax them at a lower rate than other property.[1]

Congress may also confer upon the city authority to assess adjacent proprietors with the expense of repairing streets,[2] and the tax need not be a general one over the city. In exercising this legislative power over persons and property within the District, Congress can also, provided no intervening rights are impaired, confirm the proceedings of an officer in the District, or of a subordinate municipality or other authority therein, which, without such confirmation, would be void,[3] and can also provide for the cost of a public improvement to the District by assessing a proportionate part on the property specially benefited.[4] It was held in this case that the United States possesses

[1] Gibbons v. District of Columbia, 116 U. S. 404, 29 L. Ed. 680 (1886).

[2] Willard v. Presbury, 14 Wall. 676, 20 L. Ed. 719 (1872).

[3] Mattingly v. District of Columbia, 97 U. S. 687, 24 L. Ed. 1098 (1879).

[4] Shoemaker v. United States, 147 U. S. 282, Sec. 415, *supra*. In this case it was claimed that the owner of the lands should be allowed in the assessment of damages for the value of prospective gold mines; but the Supreme Court sustained the court below in holding that, if there were any such mines, they were reserved to the Crown in the original grant by Charles I in the charter to Lord Baltimore, and therefore passed to the State and thence to the United States.

full and unlimited jurisdiction, both of a political and municipal nature, over the District, including the power of eminent domain, and this is not controlled by any provision in the act of cession by the State of Maryland.

While Congress can constitute the District a body corporate for municipal purposes, it can only authorize the municipality thus created to exercise municipal powers. It cannot, therefore, delegate legislative power to levy a tax interfering with interstate commerce. Thus, an act of the legislative assembly of the District of Columbia established by Congress, requiring commercial agents offering merchandise for sale by sample to take out and pay for a license, was adjudged void[1] as being a regulation of interstate commerce, and not within the authority granted by Congress, nor within the authority which Congress was competent to grant. It was argued in this case that it is beyond the power of Congress to pass a law of this character solely for the District of Columbia, because whenever Congress acts upon the subject the regulations it establishes must constitute a system applicable to the whole country. The court said that the disposition of the case called for no expression upon this point.

Congress has vested the executive authority of the District in a board of three commissioners, one of whom is required to be an officer of the Engineer's Corps of the United States Army, and the others citizens of the United States and actual and permanent residents of the District for at least three years before their appointment, while the legislative authority, as stated, remains in Congress.[2] The District, therefore, has been defined as neither a sovereignty nor a territory, but simply a municipal corporation with such powers and liabilities as are common to

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[1] Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. Ed. 637 (1889). Justice Miller dissented on the ground that this was not interstate commerce, as the District of Columbia was not a State.

[2] The Engineer Commissioner is detailed for service by the President, and the civilian commissioners are appointed by the President and confirmed by the Senate for a term of three years. See 20 U. S. Stat. at L. 102.

municipal corporations in general, except so far as they are affected by Acts of Congress.[1]

§ 599. **Power of Congress in Enforcing Collection of Taxes.** —The power of Congress is both "to lay and collect taxes," and the grant of the taxing power is reinforced by what has been termed the "co-efficient power" contained in the last paragraph of the same section,[2] "the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It was said by Mr. Madison in the *Federalist*:[3] "Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by

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[1] Metropolitan Railway Co. v. District of Columbia, *supra*.

There is no inheritance tax law in the District except that enacted by Congress, September 8, 1916, *supra*, 561n. There is a system of license taxes for different kinds of business, trades and professions and occupations, see 32 U. S. Stat. 622. The rate of taxation on real estate and personal property is $1.50 on $100 payable in the month of May with the privilege of paying one-half of the taxes in the previous month of November. If not paid in May a penalty of 1% per month attaches until the property is sold. The valuation placed by the owner of personal property is subject to review by the Board of Personal Tax Appraisers. A report of personal property must be made before August 1st. Real estate may be sold by the Collector of Taxes after advertisement as fixed by statute. If the property is not redeemed within two years from date of sale, the purchaser is entitled to a deed from the commissioners. Corporations are taxed on the same basis as individuals, that is, one and one-half per cent on the assessed value, but from the assessed value is deducted the value of any real estate owned by the corporation in the District. Business companies having no special franchise or privilege are assessed and taxed as individuals.

By Act of September 1, 1916, a tax of four mills is levied on moneys and credits, including moneys loaned and invested, and bonds and shares of stock, with certain exceptions.

[2] Tucker on Const., p. 600; Federalist, No. 33.

[3] Federalist, No. 44.

unavoidable implication. No axiom is more clearly established, in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power for doing it is included."[1]

It follows, therefore, that Congress, in levying taxes, has the right to select the reasonable, appropriate and customary methods of collection. The due process of law in the Fifth Amendment, which restrains the powers of Congress as the Fourteenth Amendment restrains the powers of the States, is consistent with summary procedure in the collection of taxes.[2] The collection of the direct tax upon land levied by Congress during the Civil War was therefore enforced through the sale of delinquent lands, the collection of excises and duties upon commodities by summary seizure and forfeiture, and license taxes upon business through the requirement under penalties of a license as a condition precedent to the right of carrying on the business. In the Spanish War Revenue Act, the tax upon commercial exchange sales was collected through the requirement of a stamped memorandum required to be delivered by the seller to the buyer. In reply to the argument that this was an unreasonable requirement and an interference with strictly intrastate commerce, the court said[3] that Congress might have required a sworn report instead of a memorandum, but whether the means adopted was the best and most convenient was a question for the judgment of Congress, and its decision must be conclusive. "As Congress had the power to impose the tax, the means adopted for its collection within reasonable and rational limits must be a question for Congress alone."

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[1] McCullough v. Maryland, *supra*, Sec. 555.

[2] Murray v. Hoboken Land Co., *supra*, Sec. 340.

[3] Nicol v. Ames, 173 U. S. 524, *supra*, Sec. 565.

CHAPTER XVIII.

THE ENFORCEMENT OF FEDERAL LIMITATIONS UPON THE STATE TAXING POWER.

§ 600. Judicial remedies for illegal taxation.
601. Two forums for Federal question in taxation.
602. Amount of tax as affecting procedure.
603. Value of the right involved as affecting jurisdiction of Federal court.
604. Pleading Federal question in U. S. courts.
605. Federal question and right of removal.
606. Federal question on writ of error to State court.
607. What is a Federal question.
608. Party admitting correctness of his own tax cannot invoke Federal protection.
609. Questions of fact not considered on writ of error to State court.
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641. Mandamus must be based upon statute authorizing tax.
642. Local tax laws administered in Federal courts.
643. Local law and general law distinguished.
644. Suits by stockholders in right of corporation.
645. Burden of proof in resisting taxation.
646. Remedy against tax officials.
647. Importance of speedy remedy in taxation.

§ 600. **Judicial Remedies for Illegal Taxation.**—Where a tax is levied under the provisions of an unconstitutional act, the official enforcing such tax is no more justified in contemplation of law than if the act had not been passed. The official in such case has no legal sanction for his conduct, and is guilty of a personal violation of the taxpayer's rights. In the language of the Supreme Court, "an unconstitutional act is not a law; it binds no one and protects no one."[1]

It is a cherished maxim of the law that where there is a right there is a remedy. It is also a fundamental principle of our jurisprudence that the ordinary courts of justice are open for the protection of the citizen against those acting under governmental authority without due process of law. We have no official or administrative courts, such as those in the Continental States of Europe, where courts of law have not as a rule the power to decide upon the legality or illegality of the administrative acts of executive officials.[2] Such controversies in our jurisprudence are adjudged and determined by the due course of law, that is, by the law of the land, wherein the official stands as any other litigant, and must justify by due process of law.

"No man in this country," said Mr. Justice Miller,[3] "is so

[1] Justice Field in Huntington v. Worthen, 120 U. S. 101, *supra*.

[2] Brinton Coxe, "Judicial Power and Unconstitutional Legislation," Ch. 102; Introduction to Thayer's "Cases on Constitutional Law," p. 5.

[3] United States v. Lee, 106 U. S. 196, p. 220, 27 L. Ed. 171 (1882).

high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.'"[1]

In the practical regulation of the remedial procedure of taxation, these fundamental principles must be reconciled with the public necessity, which requires that the collection of public revenues must be made at stated periods,[2] with the principle of public law, which prohibits a suit against a sovereign State except with its own consent and under conditions imposed by itself, and with the principles of public policy which protect administrative officers in the erroneous exercise of official discretion, and executive officers in the enforcement of process regularly issued and fair upon its face.

It is not within the scope of this work to discuss in detail the statutes and rules regulating the jurisdiction of the Federal Courts, still less is it the purpose to consider the varying systems of procedure of the several States which may be followed in testing the validity of State taxation. Thus, some States collect taxes through plenary actions at law, wherein the illegality of the tax may be pleaded and determined.[3] In other States, as in the United States, the payment of taxes under protest, with an action to recover back the amount illegally

[1] Judge Dillon, in his Laws and Jurisprudence of England and America, p. 225, says: "Arbitrary power and special administrative tribunals, such as we find in France and other countries, administering what the French call *droit administratif*, do not exist. In England the same law applies to all persons, and it is administered for and against all persons in the great law courts. The law of England knows nothing of exceptional offenses punished by extraordinary tribunals. So also direct personal responsibility for torts—for any invasion of the legal rights of another, exists without limit or exception. No command of an official, not even of the crown, can be pleaded in bar of any wrongful act."

[2] "If there existed in the courts, State or national, any general power of impeding or controlling the collection of taxes by relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary." Miller, J., in Cheatham v. United States, 92 U. S. 89, 23 L. Ed. 561 (1876).

[3] As in Missouri, see author's "Taxation in Missouri," Ch. XV.

paid, is authorized and regulated by statute.[1] In some States special statutory procedure for determining the validity of taxation and the equality of assessments is provided. The questions of procedure involving the construction of these widely varying statutes will be found in the local statutes and decisions. The subject of the procedure in the collection of taxes, required by due process of law, under the Federal and State constitutions, has been considered.[2] It is the purpose here to consider only those matters of procedure which are involved in determining the lawfulness of the exercise of the taxing power, State and Federal, under the Constitution of the United States.

§ 601. **Two Forums for Federal Question in Taxation.**— There are two distinct forums and modes of procedure for securing, on the Federal question in taxation, the judgment of the Supreme Court, that tribunal being the final arbiter in the construction and application of the Federal Constitution and laws.

One method of procedure is by raising the Federal question, that is, the claim of right or exemption under the Constitution and laws of the United States, in the State court, by way of defense in whatever proceeding is brought to enforce the tax, or by resisting the collection in whatever form of proceeding is authorized by the law of the State. It is not only essential that the claim of Federal right should be distinctly made upon the record, but also that the procedure adopted in resisting the tax should be appropriate under the State law, as the decision of the State court upon this latter question is conclusive. If the Federal claim is "specially set up" in the record, and decided adversely by the highest court of the State having jurisdiction, that decision may be reviewed upon writ of error by the Supreme Court.

Under the amendments of 1914 and 1916 the Supreme Court

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[1] As in Tennessee, see Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610 (1877); also Secs. 3226, 3228, R. S. 5949, 5951 Comp. Stat. U. S., *infra*, Ch. XIX.

[2] *Supra*, Ch. XI.

may in its discretion review the decision of the highest State court by *certiorari,* if the Federal claim is sustained by the State court.[1]

The other method of procedure, which may be employed in asserting a Federal right against taxation, is by invoking the Federal jurisdiction in the first instance by suit in the United States District Court for the proper district, either on the ground of adverse citizenship if it exists in the case, or on the

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[1] The Act of December 23, 1914, amending the Judicial Code, Sec. 237, p. 347, *supra,* was amended by Act of September 6, 1916, so that Section 237 of the Judicial Code, as amended, reads as follows: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the same to the court, from which it was removed by the writ. It shall be competent for the Supreme Court, by *certiorari* or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

ground that the case arises under the Constitution and laws of the United States.[1] When suit is thus brought in the United States court, the unsuccessful litigant may go directly by appeal, if in equity, or by writ of error, if the action is at law, to the Supreme Court, the appellate jurisdiction depending only on the claim, in the case of a State tax, that the State law is repugnant to the Constitution of the United States. This right of appeal extends to both parties and the whole case is brought to the Supreme Court.[2] The construction or application of the Constitution involved in the case, in order to maintain such an appeal, must be controlling, although other questions may be open to determination and may be decided.[3]

§ 602. **Amount of Tax as Affecting Procedure.** — Where the jurisdiction of the Supreme Court is invoked on writ of error to the highest court of the State having jurisdiction, the *amount* of the tax involved in controversy is immaterial; the only essential is the denial by the State court of a Federal right.[4] Neither is there any pecuniary limit in the appellate

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[1] It is provided by the Judicial Code, Sec. 24, as amended December 21, 1911, that the District Courts of the United States shall have original jurisdiction as follows: "Of all suits of a civil nature at common law or in equity brought by the United States, or any officer thereof authorized by law to sue . . .; or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and arises under the Constitution and laws of the United States, or treaties made, or which shall be made under their authority, or as between citizens of different states, or as between citizens of the State and foreign states, citizens, or subjects. . . ."

[2] Loeb v. Columbia Township, 179 U. S. 472, 45 L. Ed. 280 (1901).

[3] Carey v. Houston & Texas Cen. Ry., 150 U. S. 171, 37 L. Ed. 1041 (1893); Horner v. United States, 143 U. S. 570, 36 L. Ed. 266 (1892).

[4] In Sentell v. Railroad Co., 166 U. S. 698, 41 L. Ed. 1169 (1897), the Supreme Court determined on a writ of error a claim for the value of a dog, and sustained, as valid under the Fourteenth Amendment, a statute of Louisiana, providing that no dog should be entitled to the protection of the law unless placed upon the assessment rolls. The court held also that, in a civil action for killing a dog, the owner cannot recover beyond the value fixed by himself in the last assessment.

jurisdiction of the Supreme Court or of the Circuit Court of Appeals over the United States District Court.[1]

On the other hand, the jurisdiction of the United States District Court, whether by original suit therein or by removal from the State court, only attaches where the amount in controversy "exceeds, exclusive of interest and costs, the sum or value of $3,000.00." In a suit involving the legality of a tax the "amount in controversy" is the amount of the tax, not the value of the land or the property upon which it is levied.[2] If the claim is only that the tax is *excessive* in amount, then the alleged excess is the amount in controversy, and, as will be seen, the payment of what is not claimed to be excessive is required as a condition of litigating the excess.

Separate and distinct assessments against different property owners, although made under the same law and in the same taxing district, cannot be "lumped" for the purpose of giving jurisdiction, but each of such cases involves a separate controversy, requiring the jurisdictional amount.[3]

It therefore follows that, where the amount of the tax claimed to be illegal or excessive does not exceed $3,000, the Federal claim must be asserted in the State court in such proceeding as may be authorized by the State, subject to the right of review

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[1] The Paquete Habana, 175 U. S. 677, 44 L. Ed. 320 (1900). The only pecuniary limit in appellate jurisdiction of the Supreme Court is the limit of $1,000 in cases decided on appeal in the Circuit Court of Appeals, and on which the judgment of that court is not made final, as provided in Sec. 6 of the Act of March 3, 1891.

[2] Woodman v. Ely, 2 Fed. 839 (1880); Coulter v. Fargo, 127 Fed. 912, C. C. A. 6th Circuit (1904); Purnell v. Page, 128 Fed. 496, N. C. (1902). In this case the court declined to entertain jurisdiction of a bill to restrain the enforcement of a State income tax on a Federal judge amounting to only $80.00, although the tax constituted a cloud on the complainant's title to realty, the value of which exceeded the jurisdictional amount.

[3] Woodman v. Latimer, 2 Fed. 842 (1880); Linehan Ry. Trans. Co. v. Pendergrass, 16 C. C. A. 585 (8th Circuit), 70 Fed. 1 (1895); Ogden City v. Armstrong, 168 U. S. 224, 42 L. Ed. 444 (1897), affirming 12 Utah 476; Wheless v. St. Louis, 180 U. S. 379, 45 L. Ed. 583 (1901), affirming 96 Fed. 865.

in the Supreme Court on writ of error if the Federal claim is denied.

This, however, only applies where the validity of a State tax is involved. It is provided by the United States statutes[1] that the Circuit (now District) Courts are vested with jurisdiction of all suits at law or equity arising under any act providing for a revenue upon imports or tonnage, irrespective of the amount.[2]

It is sufficient to state, in this proceeding in the United States District Court, that the taxes assessed and claimed to be illegal are a specified sum, larger than the jurisdictional limit, and it is not necessary to state how the taxes should be parcelled out by the State if collected.[3]

§ 603. **Value of the Right Involved as Affecting Jurisdiction of Federal Courts.**—While it is the rule that where the validity of the tax only is involved the amount of the tax determines the amount in controversy, it also has been held that if the complainant sues to enjoin the enforcement of an ordinance or statute imposing a license or occupation tax which he must pay in order to continue the prosecution of his business, and irreparable injury may ensue from his inability to go on in business, the Federal jurisdiction is determined in such cases by the value of the *right* to be protected, and the extent of the injury to be prevented, and such jurisdiction is therefore not avoided by reason of the fact that the license tax sought to be enjoined amounted to less than the jurisdictional amount of $3,000.00. The court said in the case cited that such a suit was not merely to enjoin the collection of a tax, but involved the asserted right of the complainant to do an interstate business without a tax or burden thereon, and that in such case the jurisdiction is determined by the value of the right to be protected

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[1] See *infra.*, Ch. XIX.

[2] See Downes v. Bidwell, 182 U. S. 248, one of the Insular Cases, *supra.*

[3] Illinois Central R. R. Co. v. Adams, 180 U. S. 28, 45 Ill. 410 (1901).

or the extent of the injury to be prevented, and not by the mere amount of the license fee involved.[1]

§ 604. **Pleading Federal Question in United States Courts.** —When the original jurisdiction of the United States District Court is invoked in a tax suit, on the sole ground that the controversy arises under the Constitution and laws of the United States, there being no adverse citizenship, the Federal question is clearly jurisdictional and must be distinctly pleaded in plaintiff's statement of his cause of action. In the language of the Supreme Court:[2] "It must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the District Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading, must dismiss the suit."[3]

It is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments must be positive.[4]

Even if the jurisdictional adverse citizenship exists, the pleading of the Federal question as a distinct ground of jurisdiction is proper, as that issue will warrant an appeal to the Supreme

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[1] City of Lee's Summit v. Jewell Tea Co., 217 Fed. 968, C. C. A. 8th Circuit (1914), affirming 198 Fed. 532.

[2] Colorado Central Mining Co. v. Turck, 150 U. S. 138, l. c. 143, 37 L. Ed. 1030 (1893), dismissing 54 Fed. 262.

[3] See also Borgmeyer v. Idler, 159 U. S. 408, 40 L. Ed. 199 (1895), dismissing 65 Fed. 910.

[4] Hanford v. Davies, 163 U. S. 273, 45 L. Ed. 157 (1896), affirming 51 Fed. 258, where the court said, l. c. 280: "We are not required to say that it is essential to the maintenance of the jurisdiction of the Circuit Court of such a suit that the pleading should refer, in words, to the particular clause of the Constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the Circuit Court is entitled to take cognizance."

Court instead of the Court of Appeals. It seems, however, that the Supreme Court, in determining whether the case is properly brought there as involving a Federal question, will look into the opinion of the District Court, not for the purpose of ascertaining the evidence or the facts upon which the judgment is based, but for the purpose of ascertaining whether either party claimed in the proper form that the State law was in contravention of the Constitution.[1]

§ 605. **Federal Question and Right of Removal.** — Under the removal statute, since its amendment in 1887, the defendant in a State court claiming a Federal right cannot remove the case to the United States court on that ground, irrespective of adverse citizenship in the cause, as the District Court has no jurisdiction, either original or by removal, of a suit arising under the Constitution, treaties or laws of the United States, unless the Federal claim appears by plaintiff's statement of his cause of action.[2] The test of the right to remove is that it must be a case over which the District Court might have exercised original jurisdiction under Section 1 of the act.[3] The Supreme Court has said that the change made from the former statute was in accordance with the general policy of the acts to contract the jurisdiction of the United States District Courts.[4]

It is not sufficient for the plaintiff's appeal to contain a suggestion, that the defendants will contend that the law under which the plaintiff claims is void as violative of the Constitution of the United States. The suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under the Federal Constitution or laws. Neither can resort be had to

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[1] Columbia Tp. v. Loeb, *supra*, Sec. 519.

[2] Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. Ed. 511 (1894).

[3] See Sec. 2 of the Act of March 3, 1887, corrected by the Act of August 13, 1888; Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185, 46 L. Ed. 144 (1901), reversing 96 Fed. 353.

[4] The case of Southern Pac. Ry. Co. v. California, 118 U. S. 109, 30 L. Ed. 103 (1886), was decided under the former statute,

judicial knowledge to raise controversies not presented in the pleadings.[1] But in such case the defendant, who has a Federal claim, is not without remedy, for, if he pleads and relies on such claim as a defense in the State court and that court decides against him, he can avail himself of the other method of procedure and carry the case by writ of error to the United States Supreme Court.[2]

A judgment of the Circuit Court of Appeals which is made final by the Judiciary Act of March, 1891, is not reviewable by the Supreme Court on writ of error, although the suit involves constitutional rights, and therefore might have been brought directly from the Circuit (now District) court to the Supreme Court; so if such a party entitled to go directly to the Supreme Court does not do so and carries his case to the Circuit Court of Appeals he must abide by the judgment of that court.[3]

But where such judgment of the Court of Appeals is entered in a case wherein the jurisdiction of the Circuit (District) Court depended on the sole ground that the cause of action arose under the Constitution or laws of the United States, it will on appeal to the Supreme Court be reversed for lack of jurisdiction in the Circuit Court of Appeals to review the Circuit (District) Court judgment.[4] If this were not so, said the court, the right to two appeals would exist in every similar case, although it had been repeatedly held that such was not the intention of the act.

§ 606. **Federal Question on Writ of Error to State Court.** —Whenever the Federal question is the basis of the jurisdiction, it should be distinctly pleaded, and, in a review of the decision of the State court by writ of error in the Supreme Court, it must appear from the record that the Federal question was

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[1] Mountain View Mining & Milling Co. v. McFadden, 180 U. S. 533, 45 L. Ed. 656 (1901), reversing 97 Fed. 670.

[2] Railroad Co. v. Mississippi, 102 U. S. 135, 144, 26 L. Ed. 96 (1880).

[3] Carey Mfg. Co. v. Acme Flexible Clasp Co., 187 U. S. 427, 47 L. Ed. 244 (1903), dismissing writ of error from 108 Fed. 873.

[4] Union & Planters Bank v. Memphis, 189 U. S. 71, 47 L. Ed. 712, reversing 111 Fed. 561 (1903).

raised and adversely decided by the State court. This adverse decision must be necessary to a complete adjudication of the controversy and decisive of the case. The statute requires that the Federal right must be distinctly "set up or claimed." The jurisdiction cannot be sustained by mere inference, but only by averment so distinct and positive as to place it beyond question that the party bringing the case from the State court intended there to assert the Federal right.[1]

The jurisdiction of the Supreme Court, however, depends, not so much upon the form of the statement of the claim in the State court, as upon the fact that the State court considered and decided a Federal question. Thus, in a case where the opinion of the State court did not consider Federal questions, but did construe and decide them in overruling a motion for rehearing, the Supreme Court held that there was sufficient to give jurisdiction on the writ of error, distinguishing this case from one where the court overruled the motion for rehearing, which set up for the first time the Federal question, without passing upon the Federal question.[2] It is also sufficient to sustain the jurisdiction of the Supreme Court, though the allegations asserting the Federal right are general and even ambiguous, provided they are treated as sufficient by the State court;[3] and, in condemnation cases where no formal answer is required, the Federal claim may be set up by written motion to set aside the verdict.[4] Thus in such a case, the Supreme Court said:

"If the State court in deciding the case has actually considered and determined a Federal question, although arising on

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[1] Oxley Stave Co. v. Butler County, 166 U. S. 649, 41 L. Ed. 1149 (1897), dismissing writ of error, 121 Mo. 614; Chicago & N. W. Ry. Co. v. Chicago, 164 U. S. 454, 41 L. Ed. 511 (1896); Michigan Sugar Co. v. Dix, 185 U. S. 112, 46 L. Ed. 829 (1902), dismissing writ of error to 124 Mich. 674.

[2] Mallett v. North Carolina, 181 U. S. 589, 45 L. Ed. 1015 (1901), affirming 149 Ill. 457.

[3] M. K. & T. R. R. Co. Elliott, 184 U. S. 530, 532, 46 L. Ed. 673 (1902), reversing 77 Mo. App. 652.

[4] C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979 (1897), affirming 149 Ill. 457.

ambiguous averments, then a Federal controversy having been actually decided the right of this court to review obtains. All that is essential is that the Federal questions must be presented in the State court in such a manner as to bring them to the attention of that tribunal. And, of course, where it is shown by the record that the State court considered and decided the Federal question, the purpose of the statute is subserved."[1]

If the judgment of the State court can be affirmed on other grounds broad enough to sustain it, without deciding the Federal question, there is no basis for the jurisdiction of the Federal court, which extends, not to the case, but to the Federal question controlling the case, and the writ of error will therefore be dismissed.[2] The Federal question is not sufficiently established, as having been set up or claimed in the State court, when the specific question does not appear in the record.[3] The court said in the case cited that it was not required to search the statutes of Mississippi to find one which could be construed as impairing the obligation of the contract.

The fact that the State court, while deciding the Federal question, erroneously holds that it is not a Federal question does not take the case out of the rule that, where a Federal question has been decided below, jurisdiction exists to review.[4] The court said that the result of the contrary doctrine would be that no case, where the question of a Federal right had been actually decided, could be reviewed in the Supreme Court, if the State court, in passing upon the question, had also decided that it was non-Federal in its character. But if the record shows that the State court did nothing more than decline to pass upon the Federal question, because, under the State practice, it was not properly brought to the attention of the trial court,

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[1] M. K. & T. R. R. Co. v. Elliott, *supra.*

[2] Rutland R. R. Co. v. Cen. Vt. R. Co., 159 U. S. 630, 40 L. Ed. 284 (1895), dismissing writ of error, 63 Vt. 1, and cases cited.

[3] Yazoo & Miss. Valley R. Co. v. Adams, 180 U. S. 41, 45 L. Ed. 415 (1901), dismissing writ of error, 76 Miss. 545.

[4] M. K. & T. R. R. Co. v. Elliott, *supra;* Carter v. Texas, 177 U. S. 442, 44 L. Ed. 839 (1900).

there is no Federal question whereon to base the jurisdiction of the Supreme Court.[1]

An objection raised in the State court that a State statute is "unconstitutional and void" will be assumed to relate only to the power of the State legislature under the State Constitution and raises no question that will give the Supreme Court of the United States jurisdiction to review a judgment of the State court sustaining the validity of the statute.[2]

A Federal question first raised in a petition for rehearing in the highest State court is raised too late to convey jurisdiction upon the Supreme Court of the United States, where such petition was denied without opinion.[3]

§ 607. **What is a Federal Question?**—A Federal question is one which is directly involved in the assertion of a Federal right or claim. Thus the validity of a tax under the Federal Constitution may involve incidentally other questions which are not Federal and the judgment of the State court thereon is final. The mere determination as to who are merchants within a State tax law involves no Federal question, which can be reviewed on writ of error to a State court where the levy of the merchants' tax involves no Federal right.[4]

Where a State statute imposing a tax on cigarette selling violates the Constitution of the State, because it does not distinctly state the tax and the object to which it is applied is a purely local question, which cannot be considered by the Supreme Court on writ of error.

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[1] Erie Railroad Co. v. Purdy, 185 U. S. 148, 46 L. Ed. 847 (1900), dismissing writ of error to 162 N. Y. 42.

[2] Layton v. Missouri, 187 U. S. 356, 47 L. Ed. 214 (1902), dismissing writ of error from 160 Mo. 64. See also Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 47 L. Ed. 598 (1903), affirming 167 N. Y. 329, where the Federal question was held to have been sufficiently presented.

[3] Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 47 L. Ed. 480 (1903), dismissing writ of error to 132 Cal. 85.

[4] American Steel & W. Co. v. Speed, 192 U. S. 500, 48 L. Ed. 538 (1904), affirming 67 S. W. (Tenn.) 806.

If it appears that the acts complained of are not the acts of the State within the meaning of the Fourteenth Amendment prohibiting a State from denying the equal protection of the laws, but the acts of certain officials who are acting without statutory authority and contrary to the law of the State as declared by the State Supreme Court, the jurisdiction of the Federal court cannot be invoked on the ground that the action of these officials is a violation of the Federal law, the remedy of complainant in such cases being in the State court.[1]

Thus where a petition to escape forfeiture of lands under a State statute because the petition did not contain a description of the land sufficient to identify it involves no Federal question, unless the ruling was so arbitrary and baseless as to amount to a deprivation of due process of law.[2]

Where the Supreme Court of the State upholds a tax title on the ground that the State statute made the tax deed valid upon its face *prima facie* evidence of the sufficiency of the notice, and that possession under such a deed for a prescribed time met the requirements of the State statute of limitation, such decision was adequate to dispose of the case, so that a question of the validity of a publication of the notice placed only in a Sunday newspaper was not open for consideration on writ of error.[3]

It is for the State courts to determine whether a law is valid under the State Constitution and as it was said by the Supreme Court, "the Constitution of the State was not taken up in the Fourteenth Amendment," and where such a case was brought from the District Court, the Supreme Court held that it would not pass upon the validity of the act complained of under the State Constitution in advance of a decision of that question by the State Supreme Court.[4]

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[1] St. Louis I. M. & S. Ry. Co. v. Davis, C. Ct. 132 Fed. 629 (1904).

[2] Kentucky Union County Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137 (1910), affirming 128 Ky. 610.

[3] See Elder v. Wood, 208 U. S. 226, 52 L. Ed. 464 (1908), affirming 37 Colo. 174.

[4] Pullman Co. v. Knott, 235 U. S. 23, 59 L. Ed. 105 (1914).

§ 608. **Party Admitting Correctness of His Own Tax Cannot Invoke Federal Protection.**—A taxpayer who admits that his own tax is correct, cannot, on the ground that he will be deprived of his property without due process of law and denied the equal protection of the laws, have a writ of error to the United States Supreme Court to review a construction by the Supreme Court of the State of the statutes of such State as exempting, in whole or in part, certain corporations whereon he is not interested from the payment of such taxation.[1]

§ 609. **Questions of Fact Not Considered on Writ of Error to State Court.**—On writ of error to the State court, it is immaterial whether the suit is an action at law or in chancery. In either case, when the facts are found by the State court, the Supreme Court is controlled by such finding. If these questions of fact are adequate to determine the controversy and broad enough to maintain the judgment, independent of any Federal question, the Supreme Court is without jurisdiction, although the State court may also have determined the Federal question.[2] When the question decided by the State court is not merely of the weight or sufficiency of the evidence to prove a fact, but is of the competency and legal effect of the evidence as relating to a question of Federal law, the decision may be reviewed by the Supreme Court on writ of error.[3]

It was said by the Supreme Court, in dismissing a writ of error to the Supreme Court of the State of Missouri to review a judgment quashing an alternative writ of mandamus to the State Board of Equalization, that questions which might arise on a writ of error to a subordinate court of the United States, could not be considered on a writ of error to the State court.[4]

§ 610. **Writ of Error is to Highest State Court Having Jurisdiction.**—The writ of error from the Supreme Court,

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[1] State *ex rel.* Hill v. Dockery, 191 U. S. 165, 48 L. Ed. 133 (1903).

[2] Egan v. Hart, 165 U. S. 188, 41 L. Ed. 680 (1897), dismissing writ of error to 45 La. Ann. 1358.

[3] Dower v. Richards, 151 U. S. 658, 38 L. Ed. 305 (1894), affirming 81 Cal. 44.

[4] State *ex rel.* Hill v. Dockery, *supra.*

under Sec. 709, R. S., U. S., is not necessarily to the highest court of the State, but to "the highest court of a State in which a decision of the suit can be had." It is therefore immaterial how the appellate jurisdiction under the State judicial system is distributed, the writ of error goes to whatever court of the State has the final jurisdiction in that case, and the decision of the State court as to what court has final jurisdiction is conclusive. If the case is not appealable, and the trial court is the court of final jurisdiction, then the writ goes to that court. The judgment, however, must be *final* and dispose of the case. A judgment reversing and remanding a cause for another trial is not a final judgment, though a decision of an appellate court of last resort, reversing and remanding a cause, and directing the specific judgment to be entered by the lower court, is a final judgment within the meaning of the Judiciary Act.

§ 611. **A Personal Interest Necessary for Writ of Error to State Court.**—A personal, and not an official, interest is necessary to entitle one to a writ of error from the United States Court to review the judgment of a State court. This was ruled in a case where the county auditor sought a writ of error to review the judgment of the State court of Indiana, requiring him to deduct from the assessed value of certain real estate the amount of a mortgage thereon in accordance with the statute of such State, even though a judgment personal in form had been rendered against him for costs, where he did not move for a modification of the judgment in that particular. It was therefore held that the auditor did not have the necessary interest to maintain the appeal, and the writ of error was dismissed.[1]

§ 612. **Practical Consideration in Selection of Procedure.**—Assuming that the tax litigant has a choice of original forums, in that the tax in dispute is of the jurisdictional amount required for suit in the United States District Court, there are eventualities, not to be overlooked, which grow out of the exer-

[1] Smith v. Indiana, *ex rel.*, 191 U. S. 138, 48 L. Ed. 125, affirming 158 Indiana 543 (1903).

cise of concurrent jurisdiction by the courts of distinct sovereignties, and the limited appellate jurisdiction of the Supreme Court over courts of the State. Thus, if the original concurrent jurisdiction of the United States District Court is invoked, there being the necessary amount in controversy, whether the jurisdiction is based on adverse citizenship or on a cause arising under the Constitution, laws or treaties of the United States, the court has jurisdiction not merely of the Federal question involved, but of the entire cause concurrent with the State courts.[1] In such a case the United States Court of Appeals or Supreme Court, in the exercise of their appellate jurisdiction, will construe for themselves the State constitution and statutes, if there is any question in the case requiring such construction. It is true that as a rule the Federal courts follow the State courts in such construction; but it is not an infrequent occurence that the Federal court is required to construe the State law without the assistance of a prior or authoritative construction by the State court, and in such case the court must exercise its own judgment upon general principles of constitutional law.[2] Thus it may well happen that a case may be decided one way by the United States District Court, when the State court would have rendered a different decision, which, being the judgment of the State court on a question of State law, could not have been reversed by the Federal court.

On the other hand, there have been several cases where the claim of the invalidity of a State tax, as violative of Federal law, has been sustained in the highest State court, and this judgment, being in favor of the Federal claim, is final, so that it cannot be reviewed by writ of error in the Supreme Court. In view of the indisposition of the latter court to overturn the tax systems of the States and its liberal construction of the State power of classification in taxation, a tax may be declared void by the State court as violative of Federal law, when it would

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[1] Greene v. Louisville & I. R. R. Co. (June, 1917), — U. S. —, 61 L. Ed. —.

[2] See remarks of Miller, J., in Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 (1878).

have been held valid by the Federal court, had its jurisdiction been invoked.

This may be illustrated by the decisions of the Supreme Court and some of the State courts as to the power of the State to make progressive rates of inheritance taxation.[1] A still more notable illustration is the decision of the Supreme Court of Missouri holding invalid, as violative of the "equal protection of the laws" under the Fourteenth Amendment, the constitutional amendment taxing mortgages as interests in the property mortgaged and excepting railroad mortgages from its operation.[2] This decision by a State court construing and applying the Federal Constitution was final. While the result was doubtless fortunate for the State, it is by no means clear, in view of the liberal construction by the Supreme Court of the State power of classification in taxation, that the same result would have been reached, if the suit had been brought originally in the Federal court.[3]

§ 613. **Jurisdiction Over Case and Over Federal Question Distinguished.**—When the Supreme Court takes jurisdiction on appeal from, or writ of error to, the United States District Court, on the ground that a Federal question is involved in the case, it takes jurisdiction of and decides the whole case and all the questions involved therein, and not merely the Federal question to which its jurisdiction is limited under writs of error to the State courts. If the case involves therefore not merely a Federal question, but also questions of general law, whereon the Federal courts do not as of course follow the decisions of the State courts, the judgment of the Supreme Court through this procedure may be secured upon the whole case, and not merely upon the Federal question. On the other hand, in the review of the decisions of the State courts, the jurisdic-

[1] See Ch. XV.

[2] Russell v. Croy, 164 Mo. 69, *supra*, Sec. 524.

[3] Under the Acts of December 23, 1914, and September 6, 1916, amending Sec. 237, Judicial Code, it is competent for the Supreme Court to require by *certiorari* or otherwise a final decision of a State court in favor of the Federal claim. See *supra*, Sec. 336, and Sec. 601.

tion of the Supreme Court is based upon and limited to the Federal question, which is involved in and decisive of the case.[1]

§ 614. **When is Federal Question in Taxation Involved?**—A Federal question in taxation is clearly raised, when it is claimed that the tax law as construed and enforced by the State impairs a right, privilege or exemption enjoyed under or protected by the Constitution, laws or treaties of the United States.[2] There is no Federal question involved in the claim that a State statute is not sufficiently definite and certain in its character, so that the amount of tax to be paid can be ascertained. The decision of the State court as to the proper construction and sufficiency of the statute is conclusive.

Neither is there any Federal question involved in a decision of a State court that assessors, in the absence of fraud or intentional wrong, are not personally liable for error in the assessment.[3] The Supreme Court said that, whether the State court decided the question correctly or not, it is not a Federal question, but one of general municipal law to be governed either by the statute law or the common law of the State.

There is no Federal question involved in a suit between the lessor and lessee of a railroad, where the lessee has paid a tax and deducted it from the rent, and was sued by the lessor for the amount of deduction on the ground that the tax was illegal as an attempted regulation of commerce. The State court held that, independently of this question of constitutionality of the tax, it was the duty of the lessor to pay the tax, that, since the

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[1] See remarks of Justice Miller in Davidson v. New Orleans, 96 U. S. 97, *supra;* also Central Land Co. v. Laidley, 159 U. S. 103, 40 L. Ed. 91 (1895), dismissing writ of error to 30 W. Va. 505. For illustrations of both forms of procedure, see Huntington v. Worthen, 120 U. S. 97, *supra;* Little Rock & Ft. Smith Ry. Co. v. Same, 120 U. S. 97; Swofford v. Templeton, 185 U. S. 487, 46 L. Ed. 1005 (1902), reversing 108 Fed. 309.

[2] For cases involving alleged impairment of the obligation of contracts, where the Supreme Court construes the State law and determines for itself the existence of the contract, see *supra*, Sec. 61.

[3] Williams v. Weaver, 100 U. S. 547, 25 L. Ed. 708 (1880); see also Tyler v. Cass Co., 142 U. S. 288, 35 L. Ed. 1016 (1892).

lessee had been compelled to pay it, the law implied a promise to repay the lessee, and that the latter was under no obligation to test the constitutionality of the tax. The Supreme court held that it had no jurisdiction to review the judgment.[1]

§ 615. **Federal Right Must be Set Up in Adversary Proceeding.**—To give the Supreme Court jurisdiction by writ of error to the State court, this claim of Federal right must be raised in an adversary proceeding where there are opposing parties, and wherein the court can render a binding adjudication. This was illustrated in a case from California,[2] where the statute authorized the board of directors of an irrigation district[3] to commence proceedings in a court of the State asking determination of the validity of the bonds it was about to issue. A resident of the district appeared and claimed that the issue of the bonds would deprive him of his property "without due process of law." The Supreme Court held that the judgment of the State court holding the bonds valid was not subject to review on writ of error. The proceeding was one in effect to secure evidence, a mere *ex parte* case to obtain a judicial opinion, upon which the parties might base further action. It said, l. c. 189:

"The State may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and unless in the course of such proceeding some constitutional right is denied to the individual, this court cannot interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims. So on this ground, and not because no Federal question was insisted upon in the State court, the writ of error will be dismissed."[4]

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[1] Rutland R. R. Co. v. Central Vt. R. R., 159 U. S. 630, *supra.*

[2] Tregea v. Modesto Irrigation District, 164 U. S. 179, 41 L. Ed. 395 (1896), dismissing writ of error to 88 Cal. 334.

[3] Under the statute declared valid in Fallbrook Irrigation District v. Bradley, *supra*, Sec. 399.

[4] Justices Harlan, Gray and Brown dissented, holding that the payment would conclude all the taxpayers in the district, and that it was therefore the duty of the court to consider the case on the merits,

§ 616. **Injunction Against Taxation in Federal Courts.**—The remedy by injunction against illegal taxation is obviously the speediest, and frequently is the only, effective remedy. But the rule is well established in the Federal courts and generally in the State courts that a tax will not be enjoined solely on the ground of unconstitutionality. The general rule that relief in equity can only be sought in the absence of an adequate remedy at law is reinforced in the Federal courts by the provision of the United States statute.[1] Although this statute is only declaratory of what was always the law, "it must, at least," said the Supreme Court, "have been intended to emphasize the rule, and to impress it upon the attention of the courts.[2]

It is also provided by statute of the United States that the writ of injunction should not be granted by any court of the United States to stay proceedings in any suit of the State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.[3]

Other provisions of the Federal statute provided that no suit for the purpose of restraining the assessment of collection of any tax shall be maintained in any court.[4]

This latter statute, however, relates only to taxes levied by the United States and will hereafter be considered in connection with the provisions of the internal revenue law providing for taxes under protest, for suits against collectors, and against the United States under the Judicial Code.[5]

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but that the judgment should be affirmed under the principles announced in Fallbrook Irrigation Dist. v. Bradley, *supra*.

[1] Sec. 723 R. S. U. S.: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 1. c. 214, 27 L. Ed. 484 (1883); Buzard v. Houston, 119 U. S. 347, 30 L. Ed. 451 (1886).

[3] R. S. Sec. 720. See also Moore v. Halliday, 4 Dillon 52 (1876), where an injunction was allowed against county officers, but denied against the prosecution of pending suits for collection of taxes.

[4] See *infra*, Ch. XIX.

[5] See *infra*, Ch. XIX.

It was said, however, by Justice Miller with reference to the provision of the Federal statute concerning proceedings in the Federal courts that although this applied only to the taxes levied by the United States, it showed the appreciation by Congress of the evils to be feared if courts of justice could interfere with the process of collecting taxes whereon the government depended for its continual existence.

It was shown by the experience of ages "that the payment of taxes must be enforced by summary and stringent means against a reluctant and often adverse sentiment, and to do this successfully other instrumentalities and other modes of procedure are necessary other than those which belong to a court of justice."[1]

§ 617. Want of Adequate Remedy at Law Must be Shown. —It is therefore required that a party asking an injunction in a Federal court against a State must show by proper averment that he has not "a plain, adequate and complete remedy at law." The mere assertion of unconstitutionality or illegality of a tax is not enough. "There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction."[2]

This principle has been applied by the Supreme Court in several tax cases.[3] Where the plaintiff alleges that he is threatened with irreparable injury, the facts constituting such injury must be stated. In Shelton v. Platt, the court said that, while an unconstitutional tax may confer no right and support no obligation, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction, where irre-

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[1] State Railroad Tax Cases, 92 U. S. 613, *supra.*

[2] Hannewinkle v. Georgetown, 15 Wall. 548, 21 L. Ed. 231 (1873).

[3] Dows v. Chicago, 11 Wall. 108, 20 L. Ed. 65 (1871); Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273 (1891); Allen v. Pullman Car Co., 139 U. S. 658, 35 L. Ed. 303 (1891); Arkansas B. & L. Assn. v. Madden, 175 U. S. 269, 44 L. Ed. 159 (1899); Pittsburgh, Etc., Ry. Co. v. Board of Public Works, 172 U. S. 32, 43 L. Ed. 354 (1898).

parable injury or other ground for equitable interposition is not shown to exist.

It is not necessary that the objection of "adequate remedy at law" should be raised by the pleadings or suggested by counsel; but the Supreme Court will, *sua sponte*, recognize the fact in examining the proofs and give it effect.[1]

There is no right to enjoin the collection of a tax after it has been paid, though under protest. The Supreme Court said that the remedy in such case is by action at law, as the only equitable ground of relief ceases with the payment of the tax, whether voluntary or compulsory.[2]

Where it appears that there is a plain and adequate remedy at law to recover the amount of a tax wrongfully assessed, irreparable injury cannot be inferred as a result of the enforcement of the tax where no facts are set forth upon which such inference can be based; and a Federal court is not vested with jurisdiction of a suit in equity to enjoin the collection of a State tax unless there is apparent some ground of equitable jurisdiction recognized by the Federal courts.[3]

§ 618. **Injunction Often Only Proper Remedy.** — But the preventive remedy to be obtained in a court of equity not only may be a proper remedy in cases of illegal taxation, but is

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[1] Allen v. P. Car Co., *supra*. It should be observed that in this and other Tennessee cases, the court commented on the fact that the State statute gave an adequate remedy by authorizing payment under protest and suit to recover, c. 44, p. 71, Laws of Tenn. 1873.

[2] Singer Manufacturing Co. v. Wright, 141 U. S. 696, 35 L. Ed. 906 (1891), following Little v. Bowers, 134 U. S. 547.

[3] Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 L. Ed. 651 (1903); C., B. & Q. R. R. Co. v. Babcock, 204 U. S. 585, 51 L. Ed. 636 (1907); Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 57 L. Ed. 1288 (1913), affirming 179 Fed. 628; Union Pacific R. R. v. Board of Commissioners, 217 Fed. 540 (1914); Nye Jenks & Co. v. Washburn, 125 Fed. 817 (1903), Circuit Court of Wisconsin; Atchison, Topeka & S. F. R. R. Co. v. Board of Commissioners, 225 Fed. 978, C. C. A. 8th Circuit (1915); Western Union Tel. Co. v. Trapp, C. C. A. 8th Circuit, 186 Fed. 114 (1911); Stonebreaker v. Hunter, C. C. A. 8th Circuit, 215 Fed. 67 (1914); Singer Sewing Machine Co. of New Jersey v. Benedict, 179 Fed. 629 C. C. A. 8th Circuit (1910).

often the only proper remedy. Thus, in the litigation involving the taxation of national bank stockholders, the remedy by injunction was held to be the proper remedy of shareholders, or of the bank suing in their behalf.[1] This was because the claim of deduction for debts must be made a reasonable length of time before the assessment role is made up, and a party therefore should proceed promptly if his claim is denied, by resorting to a court of equity "to enjoin the collection of the illegal excess, upon the payment or tender of the amount due upon what was admitted as a just valuation."

The same consideration applies in cases of special taxation for street improvements, where a party, who waits until the improvement is completed before asserting his objection, may be held to be estopped from asserting such claim, when the rights of others would be prejudiced thereby.[2] This is under the equitable principle that "he who does not speak when he ought to speak, will not be allowed to speak when he would speak."

The threatened destruction or interruption of business, through seizure of property for failure to pay a license claimed to be illegal, has been held "to constitute irreparable injury warranting an injunction,"[3] there being no adequate remedy at law.

The prevention of multiplicity of suits is a recognized ground of equitable interference, though the jurisdiction on this ground can only be invoked when the threatened suits are against the same person.[4]

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[1] Hills v. Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052 (1882); Stanley v. Supervisors, 121 U. S. 535, 30 L. Ed. 1000 (1887); Williams v. Supervisors, 122 U. S. 154, 30 L. Ed. 1088 (1887), but see People's Nat. Bank v. Marye, 107 Fed. 571 (1901).

[2] Heman v. Ring, 85 Mo. App. 231 (1900).

[3] Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258 (1900). See also Southern Ry. Co. v. Asheville, 69 Fed. 359 (1895); Detroit, Etc., R. R. Co. v. Fuller, 205 Fed. 86 (Mich., (1903).

[4] People's Nat. Bank v. Marye, 107 Fed. 571 (1901); see Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78 (1907), affirming 114 Fed. 557; Singer Mfg. Co. v. Adams, C. C. A. 5th Circuit, 165 Fed 877 (1909).

These considerations are obvious when the business of railroads and other public carriers engaged in interstate commerce is threatened with interruption by numerous suits at law, with liability to penalties therein. In such cases public policy requires an uninterrupted continuance of business and a speedy determination of the controversy, and this can only be effected through the comprehensive jurisdiction of a Court of Equity. (See Illinois and Kentucky cases, Secs. 546, 547, *supra.*)

It is obvious also that public policy often requires a speedy determination of the validity of a tax. If it is invalid, other provisions can be made for public needs, and uncertainty and delay avoided. In cases of alleged discrimination in valuation and consequent excessive taxation, it is to the interest of both the taxpayer and the public that the controversy should be promptly determined. It is for this reason that we frequently see cases made up and advanced by waiver of customary procedure, for the express purpose of avoiding the public and private embarrassments arising from delay and uncertainty.[1]

In a national bank case from Louisiana, where a money judgment was recovered by the bank against an assessor for alleged discrimination, the Supreme Court reversed the case[2] on the ground that the demurrer claiming that relief should have been sought in equity, not in law, should have been sustained. The court said that the legal remedy in this case was inadequate and incongruous, and that it was immaterial that the laws of Louisiana secured to taxpayers the right of testing the justice of assessments before courts of justice in any procedure that the Constitution and laws permitted. The adoption by the Federal courts of the State practice must not be understood as authorizing legal and equitable claims to be blended in one suit.

§ 619. **Fraud as Warranting Injunction in Taxation.** — Where a bill alleges not only that the assessment is unwarranted in law, but that the manner of making the assessment amounts to fraud upon complainant's constitutional rights, or such gross

[1] See *infra*, Sec. 620.

[2] Lindsay v. Shreveport Bank, 156 U. S. 485, 39 L. Ed. 505 (1895).

mistake as amounts to fraud, especially where it also appears that the tax for the preceding year had been similarly enjoined by a decree from which no appeal had been taken, the Federal court has jurisdiction in equity of a bill to enjoin collection of such taxes.[1] The court said that such continuing violation of constitutional rights afforded ground for equitable relief.[2]

§ 620. **Procedure in Income Tax Cases.**—This view of public policy, as demanding a prompt determination of the validity of a tax, was forcibly illustrated in the Income Tax Cases where the tax involved was levied by Congress. The decision that the tax was invalid was rendered in a suit brought by a Massachusetts stockholder in a New York Trust Company to enjoin the corporation from paying a tax alleged to be illegal. The bill also contained allegations of threatened irreparable injury, and of ineffectual demand upon the corporation to refrain.[3] The objection of adequate remedy at law was not raised, nor was the statute prohibiting injunctions against the collection of taxes levied by Congress, *supra*, Sec. 616, invoked.[4] The Chief Justice in his opinion[5] said on this point:

"The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits."

This ruling was reaffirmed in suits brought by stockholders to restrain corporations from voluntarily complying with the in-

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[1] Johnson v. Wells Fargo & Co., 239 U. S. 234, 60 L. Ed. 243, affirming 214 Fed. 180, C. C. A. 8th Circuit (1916).

[2] Pyle v. Brenneman, 122 Fed. 786, C. C. A. 4th Circuit (1903).

[3] See Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827 (1882).

[4] See dissenting opinion of Justice White, 157 U. S. 608, *supra*.

[5] 157 U. S. l. c. 554.

come tax provisions of the Tariff Act of October, 1913, the court saying that in view of the confusion, wrong and multiplicity of suits which would result when the corporation paid the tax, such a suit was not forbidden by the Federal statute.[1]

§ 621 **Injunction Only Allowed on Payment of Taxes Actually Due.**—In the State Railroad Tax Cases,[2] the rule was established in the practice of the Federal courts, that an injunction to stay the collection of taxes will not be granted, until the plaintiff has first paid the part of the tax conceded to be due, or which can be seen to be due on the face of the bill, or which can be shown by affidavits to be due, whether conceded to be due or not. The court said that the State is not to be tied up, as to that of which there is no contest, by lumping this uncontested amount with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered and tendered without the condition annexed of a receipt in full for all the taxes assessed. This was laid down as a rule to govern the courts of the United States in such cases, and in the subsequent cases cited this rule has been affirmed, and the failure to make such payment or tender treated as a fatal objection to the bill.[3] It was claimed by counsel, in the Illinois R. R. cases, that the violation of equality made the whole tax void, but the court held this to be untenable, saying: "Surely they should pay by some rule. Should they pay nothing and escape wholly because they have been assessed too high? These questions answer themselves."[4]

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[1] Stanton v. Baltic Mining Co., 240 U. S. 163, 60 L. Ed. 546 (1916); Brushaber v. Union Pacific Ry. Co., 240 U. S. 1, 60 L. Ed. 493 (1916).

[2] 92 U. S. 575, *supra*, Sec. 260.

[3] National Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469 (1881); Northern Pacific R. R. v. Clark, 153 U. S. 252, 272, 28 L. Ed. 706 (1894); Albuquerque National Bank v. Perea, 147 U. S. 87, 37 L. Ed. 91 (1893).

[4] 92 U. S. 616, *supra*, Sec. 260. See also People's National Bank v. Marye, 191 U. S. 272, 48 L. Ed. 180 (1904), affirming, with modifications, 107 Fed. 570. See also Ritterbusch v. A. T. & S. F. Co., 198 Fed. 46, C. C. A. 8th Circuit (1912). This rule enforced in

This rule rests on the cardinal principle of equity, that one who seeks equity must do equity, and it is now firmly established in the State as well as Federal courts in the law of injunctions. The plaintiff must show in his bill what portion of the tax is legal and what is illegal, in order that the court may be able to determine what portion of the tax should be paid, and what enjoined. Facts, not legal conclusions, should be stated in this regard, and an averment of "readiness to pay what is due" and even a tender in the bill is insufficient.[1] The payment or offer to pay must be actual and unconditional, and made in money to the tax collector. The rule, however, obviously does not apply where plaintiff complains of the whole tax levied and all is to be paid or nothing.[2]

Nor is a tender required of so much of the tax, as would have fallen on the receipts from commerce wholly within the State as a prerequisite to injunctive relief against the collection from a non-resident carrier, whose receipts are largely derived from interstate commerce and from investments outside of the State, of the gross revenue tax of the State which is held to be unlawfully imposed.[3]

Moreover should it appear that the tender was made in good faith, but the sum tendered was in fact less than is due, the bill is not dismissed absolutely, but an opportunity is given the plaintiff to pay the excess with the costs and penalties.[4]

The rule that tender of the valid portion of the tax is a condition precedent to relief by injunction against illegal taxation, cannot be invoked to defeat such relief in aid of a decree enjoining the collection of State taxes, where all questions con-

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an application for injunction on ground of discrimination in taxation of stock in a national bank, Charleston National Bank v. Melton, C. C. (N. Dist. of West. Va.), 171 Fed. 743 (1909).

[1] High on Injunctions (3rd Ed.), Sec. 497, and cases cited; Huntington v. Palmer, 7 Sawyer 355 (1881).

[2] Norwood v. Baker, 172 U. S. l. c. p. 300, *supra*, Sec. 426; Lewiston Water & Power Co. v. Asotin Co., 24 Wash. 371 (1901).

[3] Meyer v. Wells Fargo Co., 223 U. S. 297, 56 L. Ed. 445 (1912).

[4] C. B. & Q. R. R. v. Norton Co., 14 C. C. A. 458 (8th Circuit), 67 Fed. 413 (1895).

cerning the part of the tax not covered by the original decree were eliminated from the controversy.[1]

§ 622. **Injunction Will Not Lie When Assessment Incomplete.**—A suit to enjoin a tax commission from certifying to an assessment is prematurely brought when it is filed prior to the final meeting of a board of equalization, where the complainant has the right to invoke further action to correct the assessment if deemed excessive.[2] The court said that in this case the equity powers of the court were invoked to relieve against anticipated injury consequent upon an anticipated fraudulent assessment, before the assessment is completed, and the effect of an injunction would be to take away from the taxation commission all power of discretion and judgment in arriving at the fixed and proper valuation.

§ 623. **When Application Must First be Made to State Board.**—When the question involved is not the validity of the tax *in toto,* but wholly the amount of the assessment, alleged to be excessive, either on account of overvaluation absolute or relative, or failure to make a required deduction, application must first be made to the revising or equalizing board appointed by the State to hear and act on complaints of excessive or erroneous assessments.[3] In the absence of statute, there is no jurisdiction in the courts to review the discretion of such tribunals, that is, a court of equity is not a court of errors to review their decisions. But the procedure established by the State for the correction of assessments, whatever it is, must be followed, if open to the taxpayer, before he will be allowed to enjoin the alleged excessive assessment. If the State practice allows a judicial

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[1] See Gunter v. Atlantic Coast Line, 200 U. S. 273, 50 L. Ed. 477 (1906).

[2] Western Union Tel. Co. v. Howe, 180 Fed. 44, C. C. A. 8th Circuit (1910), quoting from C. B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. Ed. 636 (1907).

[3] Dundee Co. v. Charlton, 32 Fed. 192 (1887); Beeson v. Johns, 124 U. S. 56, 31 L. Ed. 360 (1888); Hazzard v. O'Bannon, 36 Fed. 854 (1888); Hazzard v. O'Bannon, 38 Fed. 220 (1889). See also California & Oregon Land Co. v. Gowen, 48 Fed. 771 (1892).

review of the findings of equalizing boards upon writ of *certiorari,* or other statutory procedure, resort must be had to the remedy thus provided.

It has been decided by the Supreme Court[1] that, if for any reason the statutory procedure was not open to a stockholder, as where his name was not placed on the assessment role until the time for correction had passed, his remedy then is in a court of equity to enjoin the collection of the alleged illegal excess, upon payment or tender of the amount admitted to be due on a just valuation. A party failing to apply to the State board and not resorting to injunction cannot maintain an action at law to recover the excess of taxes alleged to have been paid upon the excessive valuation. The court said that the money collected on such an assessment could not be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction, before it is reversed.

§ 624. **State Statutory Remedies do Not Oust Equitable Jurisdiction of Federal Courts.**—Whatever statutory remedies may be adopted by a State for testing the validity of tax assessments, they do not oust the jurisdiction in equity of the Federal courts, when the established principles and rules of equity permit a suitor to invoke that jurisdiction.[2] The Supreme Court, in this case, where it was claimed that the special jurisdiction vested in the State court for determining the reasonableness of freight charges fixed by the State ousted the Circuit Court of its jurisdiction, held that a suitor entitled to sue in the Federal courts in equity cannot be deprived of that right by reason of being allowed to sue at law in the State court on the same cause of action, saying:

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[1] Stanley v. Supervisors, 121 U. S. 535; Williams v. Supervisors, 122 U. S. 154, *supra,* Sec. 314.

[2] Smyth v. Ames, 169 U. S. 466, 516, 42 L. Ed. 819 (1898). In Taylor v. L. & N. R. R., 31 C. C. A., p. 545, the court, in an opinion by Judge Taft, says that it is difficult to reconcile this opinion on its facts with Ewing v. St. Louis, 5 Wall. 418, 18 L. Ed. 657 (1867), which is not in terms overruled. Western Union Tel. Co. v. Trapp, 186 Fed. 114, C. C. A. 8th Circuit 191 (1911).

"It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit (District) Courts of the United States. But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute — may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction."

The existence of a statutory procedure for determining the validity of taxation may be material in determining the adequacy of a remedy at law,[1] that is, whether the party is entitled to appeal to the equity jurisdiction of the Federal court. "The legislature of a State cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a State does not involve a question of power."[2]

Certiorari is not an adequate remedy in the Federal courts, as their power to issue the writ is limited to cases where it is necessary to the exercise of their jurisdiction. Nor is this remedy in the State court adequate in a case of alleged discrimination, when the facts relied upon to prove discrimination must be shown *de hors* the record.[3]

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[1] See *supra*, Sec. 531, note 3. See Lander v. Mercantile National Bank, Cir. Ct. of App., 6th Circuit, 118 Fed. 785 (1902), affirming 109 Fed. 21, construing Ohio statute; McKnight v. Dudley, C. C. A., 6th Circuit, 148 Fed. 204 (1906); Rockefeller v. O'Brien, 224 Fed. 541 (1916); Illinois Life Ins. Co. v. Newman, 141 Fed. 449 (1905); Mudge v. McDougal, 222 Fed. 562 (1915), holding that the statute of Arkansas did not provide an adequate remedy at law; McLaughlin v. St. Louis Southwestern R. Co., 232 Fed. 579 (1916), C. C. A., 8th Circuit, holding that an adequate remedy was provided by the laws of Arkansas by an appeal from the assessment for benefits; City Counsellor of Augusta v. Timmerman, 227 Fed. 171 (1915), holding that an adequate remedy was provided by South Carolina statute. See also Green v. L. & N. R. R. Co. (June, 1917), — U. S. —, *supra*, Sec. 547, holding Kentucky statutory remedy inadequate to bar resort to equity.

[2] Supreme Court in *In re* Tyler, 149 U. S. 164, 189, 37 L. Ed. 689 (1893).

[3] Taylor v. L. & N. R. R. Co., 31 C. C. A. 537, 88 Fed. 350 (1898). In New York the jurisdiction of *certiorari*, to correct inequalities in assessments, is enlarged by statute.

In the Sixth Circuit it was held by Judge Taft[1] that, where a State statute gives a remedy by injunction against the assessment and collection of taxes on the ground of illegality, this statute is a sufficient reason for exercising the equity jurisdiction of the Federal court. The court based this ruling upon the principle stated by Justice Miller in the case of Cummings v. Bank,[2] that Federal courts of equity will enforce new equitable rights conferred by State statutes. Judge Taft said, at p. 504:

"The main purpose of Sec. 723 of the Revised Statutes was to emphasize the necessity for preserving to litigants in courts of the United States the right to trial by jury secured by the Seventh Amendment in suits at common law, and that, where a State statute grants to litigants in its courts an equitable remedy which does not impinge on their right to a trial by jury at common law, courts of the United States, sitting in the State as courts of equity, may grant the same statutory relief as that afforded by the State tribunals."

§ 625. **Jurisdiction and Procedure in Equity.**—When the Federal jurisdiction is invoked upon substantial grounds of Federal law in the District Court, whether based on adverse citizenship or on the existence of a Federal question in the cause, the jurisdiction as already shown, extends to the determination of all questions involved in the case, whether resting upon State or Federal law. The Federal court may defer, and does defer, to the State court as to the construction of the State statutes and will also defer to the findings of *quasi* judicial bodies, as State Boards of Equalization, on questions of fact; and such judgments are *quasi* judicial in their character, which will not be set aside in the absence of fraud, unless it appears that the Board proceeded upon an improper principle.

State as well as local franchise taxes based upon an assessment of the intangible property of public service corporations made by the State Board of Equalization, may be enjoined by the Federal court for unlawful discrimination, where the proper

[1] Grether v. Wright, 23 C. C. A. 498, 75 Fed. 742 (1896).
[2] 101 U. S. 153, *supra*, Sec. 313.

State officers charged with the enforcement of the tax laws of the State, are made parties.[1]

The proper parties to an equitable suit for determining the property of a railroad company or other corporation for taxation, are determined by the ordered rules of equity procedure. Thus, a holder of mortgage bonds of a railroad company has such an interest in its property as entitles him to maintain a suit to enjoin its illegal taxation where a proper showing is made of the refusal of a mortgage trustee to prosecute such suit; but a judgment in such a suit where the company was a party, is not *res judicata* as to holders of mortgage bonds of the company previously issued when no one representing the mortgage interest was a party.[2] Where illegality affects the amount of the tax complained of, as where it exceeds a constitutional or statutory limit as to amount, the entire tax is not rendered void, and a Court of Equity would enjoin collection only of the unauthorized excess.[3]

A complainant is not debarred from maintaining a suit to enjoin the enforcement of taxes illegally levied upon lands, although he was not the owner of the land at the time of the illegal levy; nor is the failure to allege his ownership material if no objection is taken to the pleadings and the proof establishes his ownership.[4]

§ 626. **Equity No Jurisdiction to Levy a Tax.** — It is a fundamental principle that the power of taxation is legislative, and cannot be exercised otherwise than under legislative authority, even when there has been an assessment and levy of the tax so that the amount due from each taxpayer is exactly

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[1] See L. & N. R. R. v. Green (1917), *supra*, Sec. 547.

[2] See Wicomoco County Commissioners *et al.* v. Bancroft, C. C. A. 4th Circuit, 135 Fed. 977 (1905), affirming 121 Fed. 874.

[3] Cottrell v. Union Pacific R. R. Co., C. C. A. 8th Circuit, 201 Fed. 39 (1912).

[4] Clearwater Timber Co. v. Schoshone County, 155 Fed. 612 (1907). As to the right of the lessee of university lands to maintain a suit to restrain the State from levying and collecting taxes, see University of the South v. Jettson, 155 Fed. 182 (1907).

ascertainable, and in the absence of legislative authority a court has no power to collect the tax and pay it over to the party entitled thereto.[1]

In the case cited it was sought to subject certain real estate owned by the defendant to the payment of the judgment. It seems that a tax had been levied and the property duly assessed. The taxpayers of the district had repudiated their indebtedness which had been incurred in the aid of the construction of a railroad; and a mob had prevented a sale of the property by the sheriff and the collection of the tax. The complainant had recovered judgments in the Federal court on these bonds and then had brought another suit in the court against a single taxpayer for the collection of a tax assessed against him by enforcing this lien. The court held that in the absence of legislation expressly authorizing such proceeding, the court had no power to grant the relief sought.

It was held[2] that such a suit was ancillary to the original action and within the jurisdiction of the court, irrespective of the amount in controversy.

§ 627. **Habeas Corpus as Remedy for Illegal Taxation.**— The collection of license, privilege and other occupation taxes is usually enforced by criminal prosecutions, with a penalty of fine or imprisonment for prosecuting the business without a license. Where the latter penalty is imposed, the United States Circuit (District) Courts have in a number of cases on writ of *habeas corpus* released the party from prison, on the ground that such imprisonment was in violation of the Constitution and laws of the United States, that being a ground for the issue of the writ by the Federal courts under the United States statute.[3]

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[1] Preston v. Sturgis Mills Co., 183 Fed. 1 (1910), C. C. A., 6th Circuit.

[2] Preston v. Calloway, 183 Fed. 19 (1910).

[3] Sec. 753, R. S. U. S. In Asher v. Texas, 128 U. S. 129, 32 L. Ed. 368 (1888), reversing 23 Tex. App. 662, the plaintiff in a writ of *habeas corpus* was ordered discharged by the United States court on this ground, and the judgment of the State Supreme Court, denying the writ, was reversed.

But the rule is now established in the Federal courts that this writ cannot be used to perform the office of a writ of error or of an appeal. It is the settled and proper procedure, said the court in a recent case,[1] that this writ should not be issued, where the petitioner is imprisoned for violation of a State law, unless in cases of peculiar urgency; that instead of discharging they will leave the prisoner to be dealt with by the courts of the State, and that, after a final determination of the case by the State court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from the Supreme Court. The reason for this rule of procedure is that the jurisdiction given to the Federal courts to discharge, on writ of *habeas corpus,* the prisoner of the State is exceedingly delicate, and it therefore should not be exercised, unless the circumstances are of an exceptional nature. It was said, however, that a different question would be presented, if a party were compelled to submit to imprisonment notwithstanding an appeal or writ of error, before the final determination of the case upon the appeal.[2]

§ 628. **Allowance of Interest and Penalties in Tax Procedure.**—Where a penalty is claimed on delinquent taxes the true amount of the claim must be stated and no penalty is incurred by the demand of a larger amount. Subject to the established principles and rules of equity, the terms on which a court of equity will grant its relief such as the rate of interest on taxes justly owed and to be paid by a complainant as a condition of an injunction against the collection of those that are void are discretionary with the chancellor.[3] It was held in this case that a penalty of 18 per cent interest on delinquent taxes could not be collected in the absence of a demand for the true amount claimed.

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[1] Baker v. Grice, 169 U. S. 284, 42 L. Ed. 748 (1898), reversing 79 Fed. 627. See also *In re* Swan, 150 U. S. 637, 37 L. Ed. 1007 (1893).

[2] See paper by Seymour D. Thompson, Am. Bar Assn., 1883, on "Abuses of Habeas Corpus."

[3] Ritterbush v. A. T. & S. F. Ry. Co., 198 Fed. 46, C. C. A., 8th Circuit (1912).

Where a State enacts a statute for the collection of occupation taxes for civil suit or criminal prosecution, the taxpayer can raise the question of the constitutional validity of the statute as a whole or of any method prescribed for the collection of the tax. With regard to the penalties prescribed in such a statute, it was said by the Supreme Court[1] that the penalties are not so necessarily connected with the other part of the statute as to vitiate the entire act, even if that provision should be held to be void. The right of the State by a civil suit to recover the taxes imposed is wholly independent of its right to recover the prescribed penalties.

§ 629. **Equitable Relief Barred by Collusion.**—A suit in equity by a stockholder against a corporation, to restrain it from paying an Alaskan license tax, was held properly dismissed where the corporation made no serious defense and there was no showing of irreparable injury, or of any effort to secure action of the corporation or its directors as is required by Equity Rule 94, other than a demand on the resident managing agent, the distance of such directors from the place where plaintiff resided, and in which the court was held, being relied upon as an excuse for not making any further effort.[2] The court said that the facts tended to show that the suit was a collusive one, which the court should not entertain. The court said it did not involve an attempt to transfer from a State to a Federal court a controversy which really belonged to the former, as there were none other than Federal courts in the territory; yet the principle was the same, for it was an effort to secure, for the benefit of the corporation, an injunction which it could not itself obtain, and which no individual similarly situated could obtain.

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[1] Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. Ed. 688 (1910), affirming 100 Texas 647. See also Cottrell v. Union Pack. Co., *supra*, Sec. 625.

[2] Corbus v. Alaska Treadwell Gold Mining Co., 187 U. S. 455, 47 L. Ed. 256, affirming 99 Fed. 334 (1903).

§ 630. **State Can Only be Sued With Its Consent.**—A sovereign State cannot be sued, except with its own consent. This immunity is secured to the States of the American Union by the Eleventh Amendment to the Constitution of the United States, and it is immaterial that the case arises under the Constitution, or laws, or treaties of the United States.[1]

When it appears that the State is an indispensable party to enable the Federal court, according to the rules which govern its procedure, to grant the relief sought, it will decline to take jurisdiction.[2] The court said, however, in this case:

"In the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision."

The failure of several States of the Union to pay debts which they contracted to pay, in connection with their immunity from suit, has led to numerous efforts to compel the performance of these obligations through judicial proceedings. Thus an effort was made to invoke the original jurisdiction of the Supreme Court, which extends to controversies between two or more States.[3] This was sought to be effected by citizens of New York and New Hampshire, who transferred certain State bonds of Louisiana to their respective States, so that suit was brought in the name of those States against the State of Louisiana in the Supreme Court. That tribunal, however, declined to take jur-

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1 Hans v. Louisiana, 134 U. S. 1, 33 L. Ed. 842 (1900), holding that this immunity of the State from suits by citizens of other States, and citizens or subjects of foreign States extends to suits by its own citizens. The court in its opinion questions the decision in Chisholm v. Georgia, 2 Dallas 419, which occasioned the adoption of the Eleventh Amendment.

2 Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446, 27 L. Ed. 992 (1883). See also Coulter v. Weir, 127 Fed. 897, C. C. A., 6th Circuit (1904). See also Gunter v. Atlantic Coast Line, 200 U. S. 273, 50 L. Ed. 477 (1905).

3 Constitution, Art. III, Sec. 2.

isdiction,[1] saying that one State cannot create a controversy with another State, within the meaning of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens.

When the State gives its consent to be sued by providing, as is sometimes done, that claims for illegal assessments can be made through suit against certain officials in certain of its own courts, this suit cannot be brought in the Federal court. Such a suit, brought in the United States Circuit (District) Court, was held properly dismissed, as it was in effect one against the State itself, and the State had not consented to be sued except in one of its own courts.[2]

§ 631. **Suit Against State and Against State Officials Distinguished.**—A suit is in effect one against a Sate, within the prohibition of the Eleventh Amendment, when the only remedy sought is the performance of a contract by the State, and the nominal defendants have no personal interest in the subject-matter of the suit, but only as representing the State. A distinction is made between cases, where affirmative official action is sought from State officials performing an obligation, which the State owes in its political capacity, and actions at law[3] or suits in equity maintained against those who, while claiming to act as officers of the State, violate and invade personal or property rights. In the latter class of cases the officer is sued, not as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as a State official. To make out his defense he must show that his authority was sufficient in law to protect him.[4]

Thus suits against State officials to compel the performance by the State of its contracts, by seeking to enjoin them from

[1] New Hampshire v. Louisiana, New York v. Louisiana, 108 U. S. 76, 27 L. Ed. 656 (1883).

[2] Smith v. Reeves, 178 U. S. 436, 44 L. Ed. 1140 (1900).

[3] See Cunningham v. Railroad, 109 U. S. 446, 27 L. Ed. 992 (1884); United States v. Lee, 106 U. S. 196, 27 L. Ed. 171 (1883).

[4] Hagood v. Southern, 117 U. S. 52, 29 L. Ed. 805 (1886).

bringing suits against taxpayers reported to be delinquent, but who had tendered tax receivable coupons in payment of taxes,[1] to compel the levy of taxes authorized by a former law, but contrary to subsequent legislation,[2] and to compel the State to perform specifically a contract for the receipt of the State scrip for taxes,[3] were all held to be in effect suits against the State and within the inhibition of the Eleventh Amendment. A State therefore cannot be compelled by suit to perform its contracts, that is, its immunity from suit prevents the judicial power from being used to compel the performance of its contracts. In the language of the Supreme Court:

"Its contracts are substantially without sanction except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion."

The contract clause of the Constitution, however,[4] prohibits laws impairing the obligation of contracts. If such laws are passed, they are unconstitutional and void. The remedies available to parties who hold contracts of the State, as scrip or notes receivable for taxes, which are thus protected against impairment by subsequent legislation, were discussed in the Virginia Coupon Cases.[5]

Under the same principle, where the act to be done or omitted by the public official is purely ministerial, in the performance or omission of which the plaintiff has a legal interest, that performance or omission may be enforced by the court.[6] In such cases, said the Supreme Court, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer pleads the authority of an unconstitutional law for

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[1] *In re* Ayers, 123 U. S. 443, 31 L. Ed. 216 (1888).

[2] Louisiana *ex rel.* N. Y. Guaranty Co. v. Steele, 134 U. S. 230, 33 L. Ed. 891 (1900). See also as to the same distinction, Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. Ed. 363 (1891); Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014 (1894).

[3] Hagood v. Southern, 117 U. S. 52, *supra.*

[4] See Ch. II, *supra.*

[5] See Virginia Coupon Cases, *supra*, Sec. 56.

[6] Board of Liquidation v. McComb, 92 U. S. 531, 23 L. Ed. 623 (1876).

the non-performance of his duty, it will not prevent the issue of the writ. An unconstitutional law will be treated by the courts as null and void. This is the principle applied by the court in enforcing by writ of *mandamus* the levy of a tax for the payment of municipal bonds.[1]

The distinction was also made, in the Virginia Coupon Cases,[2] between the State itself and the government of the State, and a statute enacted by the State in violation of the Constitution of the United States was held in contemplation of law to be no law, and therefore a tax official assuming to act thereunder had no official sanction for his act.

The immunity of a State from suit does not extend to the municipalities created by the State; nor does it prevent the recovery of money collected by tax officials for the State and paid under protest, when the money collected had not in effect passed into the State treasury, this of course being dependent upon the laws of the State.[3]

§ 632. **Where Jurisdiction Depends Upon Party, it is Party Named in Record.**—Under the distinctions stated in the cases cited, the legal immunity of a State from suit does not prevent the equitable resistance of the levy of an illegal tax. The assessment and collection of taxes must be made through officials, and they are subject to legal process like other individuals.[4] It was said in Osborn v. Bank of the United States,[5] by Chief Justice Marshall, in sustaining an injunction against the levying of a license tax upon the branch of the United States Bank in Ohio, that, in all cases where jurisdiction depends upon the party, it is the party named in the record, not the party interested in the cause. This broad statement has been modified to the extent of holding that, where the suit is in effect one against the State, as

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[1] Seibert v. Lewis, 122 U. S. 284, 32 L. Ed. 1161 (1887), and *infra*, Sec. 640.

[2] *Supra*, Sec. 58.

[3] University of the South v. Jettson, 155 Fed. 182 (1907).

[4] *Supra*, Sec. 600.

[5] *Supra*, Sec. 8.

in the cases cited, and the State is the real defendant, and therefore an indispensable party, the jurisdiction must fail though the State is not a party to the record.[1] It was said by the Supreme Court,[2] however, that, while this ruling in Osborn v. Bank of the United States had been qualified to a certain degree by some of the subsequent decisions of the Supreme Court, yet the general doctrine there announced, that the Circuit Courts of the United States will restrain a State officer from executing the unconstitutional statute of a State, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the Constitution and would do irreparable damage and injury to him, had never been departed from. If an individual, acting under the assumed authority of a State as one of its officers and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his authority and subjected to the consequences of his conduct. A State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[3]

Although the tax law may not of itself be illegal, it may be wrongfully administered by officers of the State, so as to make the administration an illegal burden and exaction upon the individual and a violation of his constitutional rights. In such a case the fact that the officer assumes to act under a valid law will not oust the courts of their jurisdiction to restrain his excessive and illegal acts.[4]

§ 633. **Collection of Taxes on Property in Possession of Receiver of Federal Court.**—When property is in the possession of a receiver appointed by a court of the United States, it is not subject to seizure for State taxes. The exclusive remedy of the tax collector is to make application in the court which

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[1] *In re* Ayers, 123 U. S. 443, 488, *supra*, Sec. 631.

[2] *In re* Tyler, 149 U. S. 164, 191, *supra*, Sec. 631.

[3] *In re* Ayers, 123 U. S., p. 507, *supra*, Sec. 631.

[4] Reagan v. Farmers' Loan & Trust Co., 154 U. S. 390.

For jurisdiction of equity over State Boards of Equalization in assessment of interstate railroad properties, see Sec. 546-547 (*supra*).

appointed the receiver, where the priority of payment granted by the laws of the State will be recognized and enforced.[1] The receiver of the court in charge of a railroad may obtain an injunction preventing the officer, *pendente lite,* from seizing property.[2]

The Act of Congress[3] permits a receiver to be sued without leave of court, but provides that such suit shall be subject to the general equity jurisdiction of the court in which the receiver was appointed and that the receiver shall manage the property according to the valid laws of the State in which such property shall be situated. The Supreme Court said, in the case cited, that property in possession of the receiver is already in sequestration, already held in equitable execution, and that, while the lien of the taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. The receiver in that case had filed a bill in equity to restrain the collection of the taxes, on the ground that they were unconstitutional and illegal in part, tendering the amount alleged to be due. The court had thereupon granted an injunction in violation of which the sheriff levied on the railroad cars and was committed for contempt. He sued out a writ of *habeas corpus,* claiming that the suit was in effect one against the State, and that the statutes of North Carolina provided a statutory remedy for illegal assessment and taxation. But the Supreme Court said that the legislature of a State cannot determine the jurisdiction of the courts of the United States, and that, as the property was in the custody of the Circuit Court, under possession taken in a case confessedly within its jurisdiction, the petitioner was in contempt and the court was possessed of full power to vindicate its dignity and compel respect of its mandates.

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[1] *In re* Tyler, 149 U. S. 164, *supra.*

[2] Clark v. McGhee, 31 C. C. A. 321 (5th Cir.), 87 Fed. 789 (1898). Central Trust Co. v. Wabash Ry. Co., 26 Fed. 11, *contra,* was decided before the Tyler case.

[3] 24 Statutes 552, c. 373.

§ 634. **Objections to Jurisdiction and Defenses to Merits.**—The distinction between objections to the jurisdiction of the United States Circuit Court to try a suit seeking to enjoin a State tax and defenses which go to the merits and not to the jurisdiction was illustrated in a case from Mississippi.[1] The United States Circuit Court dismissed for want of jurisdiction a bill of a railroad company seeking an injunction against a tax collector on the ground of an alleged contract of exemption. Plaintiff appealed. In the Supreme Court, motion was made to dismiss the bill, because the assessment had been completed, suit brought for the taxes, and judgment recovered in the State court. The court, however, denied the motion, holding that this was a defense to the merits, not the jurisdiction, and that it did not follow that the judgment might not be reversed, as an appeal to the State Supreme Court was pending undetermined. Neither was a question of jurisdiction raised by the fact that the plaintiff did not show its right to proceed under the 94th equity rule, as this did not raise a question of jurisdiction, but of the authority of plaintiff to maintain the bill. The court said, p. 34:

"Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of the cause upon the pleadings and the evidence."

It was further said that motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law or to dispose of the merits of the case. The decrees of the circuit court were therefore reversed and remanded for hearing upon the merits.

§ 635. **Overvaluation Not a Defense in Action at Law.**—It was held by the Supreme Court, affirming a judgment of the Supreme Court of Missouri in an action at law by a tax collector for the collection of taxes from a foreign telegraph company in

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[1] Illinois Central R. R. v. Adams, 180 U. S. 28, 45 L. Ed. 410 (1901). Risley v. Utica, 179 Fed. 875 (N. D., N. Y.) (1909), where *laches* was held to mar a remedy.

Missouri, that discrimination or overvaluation by a State Board of Equalization in assessing the property for purposes of taxation was not a ground of defense in such an action at law to collect taxes.[1] The court said that the action of the taxing officers being in the nature of a judgment, must be yielded to until set aside; and this could only be done in a direct proceeding. The property owner was in effect the plaintiff in such a proceeding, and a condition of relief against the enforcement of a *quasi* judicial order, which he attacks, is a tender of payment of the taxes that he ought to pay; and this condition would still be upon him if he set up overvaluation as an equitable defense to an action brought against him. In this case the defendant made no tender but sought to defeat the whole assessment without paying or tendering anything.

§ 636. **Effect of Prior Adjudication in State Court.**—Where it was contended that the capital stock of a bank was by contract exempted from taxation under its charter and it was claimed in the Federal court that this exemption was established by a prior judgment in the State court which was pleaded as *res judicata,* the courts of the United States can give no greater efficacy to such a prior judgment than is given it in the State courts, and as it appeared that in the State court such a judgment only operated as a bar to the identical taxes litigated, that is, for the years involved, no greater effect could be given to the judgment in the Federal court where the taxes of other years were involved.[2]

In a suit involving the validity of the taxation of membership in the Chamber of Commerce in Minnesota,[3] a decision of the State court affirming a decree below, which dismissed a suit to cancel certain tax assessments and to enjoin collection of the tax, could not be said to rely only upon a ground independent

[1] Western Union Tel. Co. v. Missouri, *ex rel.*, 190 U. S. 412, 47 L. Ed. 1116 (1903), affirming 165 Mo. 502. Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. Ed. 688 (1910), affirming 100 Texas 647.

[2] Union & Planters Bank v. Memphis, 189 U. S. 71, 47 L. Ed. 712 (1903), reversing 111 Fed. 561.

[3] Rogers v. Hennepin, *supra.*

of the Federal questions raised as to the validity of the tax, where the sole reason assigned by the court for its decision was the controlling effect of its prior decision in an action by the State to recover the tax in which some, though not all, of the same objections as to the validity of the tax under the Federal Constitution were raised and overruled. The court therefore considered the case on its merits and affirmed the judgment of the Circuit Court.[1]

§ 637. **Judiciary Concluded by Decision of Political Department of Government.**—Our form of government, national and State, is based upon the distinction between the great departments of government, and the judiciary will follow the decision of the legislative or political department, on a subject lawfully determined thereby, although such decision may incidentally affect property rights. Thus the Supreme Court held[2] that a taxpayer in Alexandria, Virginia, was estopped from resisting the collection of taxes on the ground that the annexation to Virginia was illegal, and that the county was in the jurisdiction of the District of Columbia. The court said that the judiciary would follow the action of the political department of the government, which had uniformly recognized the transfer as a settled fact, the State of Virginia having been in *de facto* possession of the County of Alexandria since 1847.

§ 638. **No Equity Jurisdiction in Federal Courts to Enforce Levy of Tax.**—The application of the contract clause in the Constitution of the United States to the right to a levy of taxes in enforcement of municipal obligations is established.[3] But this right cannot be enforced through a suit in chancery to compel the levy of the tax. The appropriate, though not always effective remedy, is an action at law, the establishment by judgment of the validity of the claim and of the amount due, and then a *mandamus*, on the return of the execution unsatis-

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1 Affirming 124 Minn. 139.

2 Phillips v. Payne, 92 U. S. 130, 23 L. Ed. 649 (1876), following Luther v. Borden, 7 How. 1, 12 L. Ed. 581 (1849).

3 *Supra*, Sec. 73.

fied, requiring the proper municipal authority to raise by taxes the amount necessary to satisfy the debt. The right to this remedy is dependent upon the authority of the corporation to levy and collect taxes for their payment.[1]

The mere fact that the remedy by *mandamus* has proven ineffectual, and that no officer can be found to perform the duty of levying and collecting the taxes constitutes no sufficient ground of equity jurisdiction. The principle is the same if no one can be found to act as tax collector of regular taxes, and yet this gives no jurisdiction to a court of equity to fill the office or appoint a receiver to perform its functions. Inadequacy of legal remedy does not consist merely in failure to produce the money sought to be collected, as that is a misfortune often attendant upon all remedies. The remedy must be, in its nature, not fitted or adapted to the end in view.[2]

§ 639. **Mandamus to Issue Tax.**—When a municipality is authorized to issue bonds, this authorization implies and carries with it, in the absence of specific provision, the power to adopt the ordinary means employed by such bodies to raise funds for the payment of bonds, and the ordinary means is taxation. The power to levy a tax is therefore carried, when authority to borrow money or incur an obligation is conferred upon a municipality, without any special mention that such power is granted. The fact that specific property is pledged for the payment of the bonds, *e. g.* the railroad stock for which the bonds were issued, does not make them any the less the general obligations of the municipality, nor deprive plaintiffs of the right to a *mandamus*, compelling the levy of a tax for their payment, since the pledge is only by way of collateral security.[3]

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[1] Heine v. Levee Commissioners, 19 Wall. 655, 22 L. Ed. 223 (1874), Justices Clifford and Swayne dissenting; Walkley v. Muscatine, 6 Wall. 481, 18 L. Ed. 930 (1868); Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72 (1874); Thompson v. Allen County, 115 U. S. 550, 29 L. Ed. 472 (1885), Justice Harlan dissenting.

[2] Thompson v. Allen County, *supra.*

[3] United States *ex rel.* v. New Orleans, 98 U. S. 381, 25 L. Ed. 225 (1879); Ralls County v. United States, 105 U. S. 736, 26 L. Ed. 1220 (1882); Quincy v. Jackson, 113 U. S. 337, 28 L. Ed. 1001 (1885); Scot-

It is otherwise, however, when the power to tax is expressly limited by statute at the time of the issue of the bonds, so that the bondholder by the terms of his contract is only entitled to look to a specific tax for their payment.[1]

County auditors and treasurers, who are the instruments employed by the State to assess and collect taxes, may be compelled to levy a tax to pay a judgment on township bonds, although the corporate existence of the township has been abolished by the State Constitution and its corporate agents removed.[2]

Any uncertainty or indefiniteness in an act of Congress, purporting to validate bonds issued by counties of the territory of New Mexico, could not be urged to defeat *mandamus* to compel the levy of a tax to pay judgments upon such bonds, since whatever defense could have been set up to prevent the rendition of such judgments is not afterwards available to prevent their enforcement.[3]

§ 640. **Duty of Taxing Officers in Mandamus.**—The writ of *mandamus* to enforce the collection of judgments of the Federal courts against municipalities, said the Court of Appeals of

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land County Court v. Hill, 140 U. S. 46, 35 L. Ed. 351 (1891). In Findlay v. McAllister, 113 U. S. 104, 28 L. Ed. 930 (1885), it was held that the confederating together of persons to prevent the levy of a county tax in obedience to a writ of *mandamus*, and the prevention of the sale of property seized under the levy by threats and by intimidating bidders, and the intimidation of taxpayers and influencing them not to pay the tax, whereby the judgment creditor was injured, constituted a good cause of action.

[1] United States v. County of Macon, 99 U. S. 582, 25 L. Ed. 331 (1879); East St. Louis v. United States *ex. rel.* Zebley, 110 U. S. 321, 28 L. Ed. 162 (1884).

[2] Graham v. Fulsom, 200 U. S. 248, 50 L. Ed. 464 (1906), affirming 131 Fed. 496.

[3] Santa Fe County Commissioners v. New Mexico, *ex rel.*, 215 U. S. 296, 54 L. Ed. 202 (1909), affirming 69 Pac. 252, where held, also, that the levy was not excessive when it appeared that it would produce in excess of little more than $100, and that, since the writ issued, additional interest to the amount of $10,000 had accrued.

the 8th Circuit,[1] and the rights of their judgment creditors in their respective writs, are equally inviolable. No demand upon a municipality is necessary before instituting proceedings for *mandamus* where the statute imposes upon them the duty to levy the tax or where it is manifest that such a demand would be an idle ceremony. A demand for the payment of a judgment is a sufficient demand to levy a tax to pay it when the statute authorizes such a tax; and the statute authorizing taxes to pay judgments, become the measure of authority of the officers.

Where district bonds of a city, issued to pay for individual improvements, contain no stipulation limiting the recourse of their holders, special taxes levied for the improvements create a general liability on the city issuing them. It is no defense to an application for a writ of *mandamus* to compel the levy of a tax by a town to pay a judgment against it, that the authority of the town to tax is limited, unless it is also shown that such limited authority has also been exhausted. The authority is not exhausted by an issue of bonds.[2] Authority given to a town by a statute to carry a contracted debt, carries with it authority to levy a tax for payment of the debt, unless expressly withheld.

A *mandamus* proceeding against the members of a State board of equalization and county officers to compel them to perform their duty in levying a tax as described by statute, is not a proceeding against the State in violation of U. S. Amendment No. 11.

§ 641. **Mandamus Must be Based Upon Statute Authorizing Tax.**—This right to a *mandamus* must be based upon the statute making it obligatory upon the municipal authorities to levy a tax in payment of the judgment. Thus it was said by the Circuit Court of Appeals for the Eighth Circuit,[3] that, where no statute expressly made it obligatory upon the county to levy

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[1] U. S. *ex rel.* Masslich v. Saunders, 124 Fed. 124 (1903).

[2] Rose *et al.* v. McKie, 145 Fed. 584, C. C. A., 1st Cir. (1906), affirming 140 Fed. 145.

[3] Board of Commissioners v. King, 14 C. C. A. 421, 8th Cir., 67 Fed. 202 (1895).

a tax to pay a judgment against it, and it did not appear that the judgment was on a security issued under a statute making it obligatory to levy a tax to pay it, the court had no authority to compel, by *mandamus*, the levy of a tax to pay such judgment. Under our system of government, said the court, the power to tax is a legitimate function exclusively and cannot be exercised except in pursuance of legislative authority. A court has no taxing powers, and can impart none to the county authorities. It has therefore no jurisdiction to coerce the levy of a tax, except where the law has made it the clear and absolute duty of the county authorities to levy such tax. When the law has made it the duty of the levying court or board to levy a tax to pay a specified class of indebtedness, the Federal court in which a judgment has been rendered in that class of indebtedness may, by *mandamus*, compel the assessment, levy and collection of a tax to pay such judgment; but this is the limit of its power. As there was nothing shown as to the nature of the cause of action which affected the contract right to the levy of a tax, it was treated as an ordinary case of county indebtedness, and the discretion of the commissioners was held not subject to control by *mandamus*.

§ 642. **Local Tax Law Administered in Federal Courts.**— The jurisdiction of the Federal court is frequently invoked on the ground of diverse citizenship in cases involving the construction and application of State tax laws, where there is no distinct Federal question involved. Thus tax deeds may be offered in evidence in the Federal courts in ejectment suits or other actions affecting titles to real estate. It is a general rule that the Federal courts in such cases, exercising a concurrent jurisdiction with the State courts, administer the State laws, as construed by the State courts. Thus the Supreme Court said in a case from Mississippi, involving the validity of a tax deed:[1]

[1] Lewis v. Monson, 151 U. S. 545, 38 L. Ed. 267 (1894). In Geekie v. Kirby Carpenter Co., 106 U. S. 379, 27 L. Ed. 157 (1882), the court, construing the tax law of Wisconsin, held that a tax deed was invalidated by the fact that the sum to raise which the land was sold included five cents for the United States Revenue stamp, to be put, and

"No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the State for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the State has power to prescribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded."

§ 643. **Local Law and General Law Distinguished.**—It is only on questions of local law involving the construction of a State constitution or statute, or which have become rules of property in the State, that the Federal courts follow as of course the decisions of the State courts. Such decisions are not "laws of the State" within the meaning of Section 721, Revised Statutes, which provides that, in the absence of Federal legislation, the laws of the several States shall be regarded as rules of decision in actions at law in the Federal courts in cases where they apply.[1] Rules of property may thus be established in a State in regard to real estate and domestic relations, which the Federal courts will follow, but upon questions of general jurisprudence or commercial law, the Federal courts exercise their own judgment. Thus the public purpose which will warrant the exercise of the State taxing power in the payment of municipal bonds is a question of general law.[2] This distinction

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which was put, on the certificate issued to the purchaser at the sale. The court said that the item was improperly included, but that the error was cured by the provision of the Wisconsin statute of limitations affecting tax deeds, as construed by the courts of that State.

[1] Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772 (1893), Justice Field dissenting; Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359 (1883); Warburton v. White, 176 U. S. 484, 44 L. Ed. 555 (1900). See also "The Common Law in the Federal Courts," by E. C. Eliot of St. Louis, 36 Am. Law Review, 498.

[2] Olcott v. Supervisors, 16 Wall. 678, 21 L. Ed. 382 (1873), Chief Justice Chase and Justices Davis and Miller dissenting.

was the basis of the judicial conflict in several States between the State and Federal courts, as to the validity of such municipal obligations. The court said, in the case cited:

"The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us."

The Supreme Court can exercise this independent judgment on questions of general law, as distinguished from local law, only in the regular course of its jurisdiction. Thus, on writ of error to a State court, it can only decide a Federal question, and an erroneous decision of a State court upon a question of general law does not constitute a Federal question. The Supreme Court may dismiss a writ of error to review the decision of a State court in such a case, on the ground that no Federal question is involved, when, if the case had come before it in its regular appellate jurisdiction over the United States District Court, it would have decided the question differently from the way the State court decided it.[1]

§ 644. **Suits by Stockholders in Right of Corporation.** — The Income Tax decision was rendered in what is known as a stockholder's suit, one brought by a stockholder in right of the corporation to restrain the corporate management from threatened illegal use of the corporate assets. The right to maintain such a suit to restrain payment of an alleged illegal tax was sustained by the Supreme Court in Dodge v. Woolsey.[2] When this case was decided in 1856, there was no means by which the corporation could bring a suit in the United States Circuit (District) Court against a citizen of the same State, in resisting a tax on the ground of a Federal right. Subsequently, by

[1] See Central Land Co. v. Laidley, 159 U. S. 103, 40 L. Ed. 91 (1895), where Justice Gray in his opinion calls attention to an illustration of this distinction in two decisions relating to municipal bonds of Iowa. Gelpke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520 (1864), and Railroad Co. v. McClure, 10 Wall. 511, 19 L. Ed. 997 (1871).

[2] 18 How. 331, 15 L. Ed. 401.

the Act of 1875, the law was amended so as to give the right, which still exists, to bring a suit in the United States Circuit (District) Court, on the ground that the case involves a claim under the Constitution or laws of the United States, so that a stockholder's suit is no longer necessary to secure original Federal jurisdiction for a domestic corporation in resisting taxation, on the ground of a Federal right.

This procedure, however, was resorted to in other cases not involving Federal questions, where it was desired to secure the jurisdiction of the United States District Court on the ground of adverse citizenship, and the "non-resident stockholder" became a frequent litigant in the Federal courts. This resulted in the re-examination of the whole subject of stockholders' suits, in Hawes v. Oakland, decided in 1882, wherein an exhaustive opinion was rendered by Mr. Justice Miller,[1] and the conclusions of the opinion were formulated in Equity Rule 94, still in force.[2]

§ 645. **Burden of Proof in Resisting Taxation.**—The burden of proof, which devolves upon the actor in all litigation, is emphasized in tax litigation, that is, in litigation involving the legality of taxation, in that the litigant must overcome the presumption that assumes the validity of the exercise of legislative power, and the further presumption when the acts of taxing officers are complained of, that such officers do not violate

[1] 104 U. S. 450, 26 L. Ed. 827.

[2] Equity Rule 94 (adopted Oct. Term, 1881): "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by the operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

their sworn duty. This principle was forcibly illustrated in a case from New Orleans, where a State bank complained of an alleged illegal assessment, on the ground that its capital was invested in legal tender notes, which were then exempt from taxation. The bank proved that it had some $760,000 invested in such notes, but its nominal capital was a million dollars, and it owed its depositors over $3,000,000. The Supreme Court[1] said that no proof was offered to show that the cash exclusively constituted the capital, and that the cash on hand was just as applicable to the depositors as to the capital. The burden of proof was therefore on the bank to show that it had been unlawfully taxed, and, in the absence of such proof, the decision of the assessor must stand.

A party suing to recover a tax paid under protest has the burden of showing such excess and is not entitled to recover where the evidence is uncertain, inconclusive and unsatisfactory.[2]

§ 646. **Remedy Against Tax Officials Individually.** — In theory the officer who enforces an illegal tax, that is, a tax levied under an unconstitutional statute, has no official sanction for his acts. In the language of the Supreme Court:[3] "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." The same court has said that the ground of the jurisdiction in restraining the collection of taxes imposed in the name of the State, but contrary to the Constitution of the United States, and sought to be collected by seizure of property, is that the officers, though professing to act as officers of the State, are threatening a violation of the property or personal

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[1] Canal and Banking Co. v. New Orleans, 99 U. S. 97, 25 L. Ed. 409 (1879).

[2] Great Northern Ry. Co. v. Okanogan County, 223 Fed. 198 (1915); Newbauer v. American Seating Co., 171 Fed. 273 (1909).

[3] Norton v. Shelby County, 118 U. S., *supra*, p. 442, 30 L. Ed. 178 (1886).

rights of the complainant, for which they are personally and individually liable as trespassers.[1]

The taxing power, however, may be unlawfully exercised under a valid statute. Thus assessors may err in not allowing exemptions or deductions, or a tax may be excessive through discriminating valuation. In such cases the taxpayer is subjected to illegal taxation under a valid law, and the principle above stated has no application. Furthermore the principle of the individual responsibility of taxing officials is not of great practical importance, even in cases where it applies, as the remedy at law for damages against trespassing officials individually is rarely adequate to resist the unlawful exercise of the taxing power.

As tax assessors are required to exercise their discretion in the valuation of property, it is clear that they cannot be charged with personal responsibility for the erroneous exercise of such discretion. Thus it was held in New York[2] that assessors having jurisdiction of the person taxed and the subject-matter are not individually liable for an erroneous assessment made in good faith, even in refusing to allow deduction for debts in the case of bank shares, as required by the Act of Congress. On writ of error to the Supreme Court, this decision was held to involve, not any Federal question,[3] but one of general municipal law, to be governed by the common law or the statute law of the State. The fact that the error consisted of a misconstruction of an Act of Congress could make no difference, for an officer acting judicially is no more liable for a mistaken construction of an Act of Congress than he would be for mistaking the common law or a State statute. The immunity declared in this case is that which is always extended where public officers are vested with a discretion in the performance of their duties.

A tax collector is protected in the collection of tax bills fair upon their face, regularly issued from the tribunal having jurisdiction, and containing nothing by way of recital or omission

[1] *In re* Ayers, 123 U. S., p. 500.

[2] Williams v. Weaver, 75 N. Y. 32 (1878).

[3] 100 U. S. 547, 25 L. Ed. 708 (1880).

to apprise him that they were issued without legal authority. He is protected in such action against all illegalities except his own.[1] This is the rule applied by the United States courts as to the United States collectors. The Supreme Court says that of such an officer the law exacts unhesitating obedience to its process.[2] This immunity is extended upon considerations of public policy and requires that the process shall be issued by an authority having jurisdiction of the subject-matter and that it be regular upon its face. It applies only to personal liability, and does not extend to the protection of any title acquired and conveyed by the collector in enforcing an illegal tax.

An officer who was charged with the specific duty of levying taxes to pay a judgment was held responsible in damages to the judgment plaintiff for failure to levy the tax as directed by a writ of *mandamus*. The court said, p. 138:[3] "The rule is well settled, that where a law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender."[4]

§ 647. **Importance of Speedy Remedy in Taxation.**—There is an obvious distinction between the remedies appropriate to the construction and administration of tax laws and those required in the determination of the validity of the taxation, that is, of the question whether the power of taxation has been lawfully exercised. In the former case it is right and proper that parties should be remitted to the remedy by legal action, especially when an adequate remedy is provided by payment under

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[1] Mechem on Public Officers, Sec. 690.

[2] Haffin v. Mason, 15 Wall. 671, 21 L. Ed. 196 (1873); Hardin v. Honeback, 137 U. S. 43, 34 L. Ed. 580 (1891).

[3] Amy v. Supervisors, 11 Wall. 136, 20 L. Ed. 101 (1871).

[4] In People v. Smith, 123 Cal. 70 (1898), the public assessor charged with the official duty of collecting poll taxes and personal property taxes was held, under the doctrine of the Amy case, to be responsible upon his official bond for failure to perform this ministerial duty.

protest and suit to recover, as in the case of taxes levied by Congress and in some of the States, as provided by their statutes. While it is true that the government should not be embarrassed by the interruption of the collection of its revenue at stated periods, it is also true that, when the validity of a tax is involved, the public, as well as the private, taxpayer is interested in the speedy determination of the question. If the tax is invalid, the government should know it as soon as possible, so that it may provide other means of revenue; and the taxpayers should also know it, so they can avoid uncertainty and may promptly discharge what is lawfully due.

This consideration of public policy was forcibly illustrated in the Income Tax Cases, where the public interest demanding a speedy determination of the validity of the tax really forced what may seem a practical evasion of the provision of the Federal statute as to the form of procedure. The truth is that, in our busy industrial life, the extension of preventive remedies is demanded of a progressive jurisprudence, and in no department of the law is this so clearly to the interest both of the public and the private litigant, as in questions involving the validity of taxation. This is especially true, because the increasing expenditures of government are forcing the trial of new and experimental forms of taxation, and it frequently happens of recent years that test cases are made up and regular forms of procedure waived for the purpose of securing speedy judicial determination.

It is remarked by Mr. High, in his work on injunctions,[1] that in no branch of the law of injunctions has there been manifested greater apparent want of harmony in the decisions of the courts than in the exercise of the restraint on the power of taxation, and that it is difficult, if not impossible, to harmonize completely and perfectly the principles, which seem to have the weight of authority in their support, with all the decided cases. In the courts of the United States, as already shown, the alleged unconstitutionality of a tax is not sufficient ground for injunction, but there must be some circumstances bringing the

[1] 1 High on Injunctions (3d Ed.), Sec. 484.

case within the recognized scope of equity jurisdiction, such as a threatened cloud upon the title of real estate or a multiplicity of suits.[1]

Much has been said in judicial opinions of the public policy which forbids judicial interference with taxation, and the influence upon our jurisprudence of the ancient historic jealousy of courts of chancery is illustrated in the opinions of eminent judges. Thus in some States where license taxes are enforced by criminal prosecutions for doing business without license, this mode of enforcement is held to bar injunctive relief, on the ground that such relief would be enjoining criminal prosecutions; and in such cases parties are compelled to submit to a criminal conviction in order to test the validity of the tax, there being as a rule no right of appeal except from a conviction.[2] But in a threatened trespass which may destroy property, what matters it that the trespasser may be also guilty of a crime? The injunction restrains, not the crime, but the irreparable injury to property. So, in the case of annoyances to business by threatened criminal prosecution enforcing illegal taxation, the jurisdiction of equity would be properly invoked, not to restrain the prosecutions as such, but to prevent the irreparable injury to business and property from the attempted enforcement of illegal exactions.

The fact that a State authorizes the payment of taxes under protest with suit to recover back, under the same system as authorized by Congress in regard to Federal taxes, has been held

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[1] Dows v. Chicago, 11 Wallace 109, 20 L. Ed. 65 (1871); Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, 28 L. Ed. 1098 (1885).

[2] For illustrative cases where the injunctive remedy was denied and the determination of the validity of a tax affecting extensive business interests only secured through criminal prosecution, see State *ex rel.* v. Wood, 155 Mo. 425 (1900); State v. Bixman, 162 Mo. 1 (1901). In the case first cited, an injunction restraining the enforcement of the tax was arrested by a writ of prohibition, on the ground that the Circuit Court had no jurisdiction, because the bill did not state facts sufficient to bring the case within the class in which injunctions may be granted; while in the other case the tax itself was declared valid by a vote of only four judges against three.

of itself to constitute an adequate remedy at law. *E converso,* should not the absence of such a statutory remedy be of itself a basis for preventive relief?

Judge Taft, in holding that, where a State gives a remedy by injunction against the assessment and collection of taxes on the ground of illegality, such statutory remedy may be afforded by the Federal court sitting in equity,[1] said:

"No one can doubt that the remedy by enjoining an illegal tax raises in the most summary and satisfactory way the question of the illegality of the tax, and relieves the taxpayer of the burden of paying the tax or waiting the slow process of a civil suit by the State to recover it from him."

It was said by Chief Justice Marshall in Osborn v. Bank, that the single act of levying the tax in the first instance is the cause of an action at law, but this affords a remedy only for the single act, and is not equal to the remedy in chancery which prevents a repetition and protects the privilege.

The Supreme Court of Massachusetts said:[2]

"The power to raise and assess taxes, although essential and necessary to the maintenance and support of civil government, is to be exercised with care, and to be kept strictly within the limits imposed by law. It is the clear right of every citizen to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation. If any such illegal encroachment is attempted, he can always invoke the aid of the judicial tribunals for his protection, and prevent his money or other property from being taken and appropriated for a purpose or in a manner not authorized by the Constitution and laws. The legislature of this commonwealth have provided a speedy and effectual remedy against the danger of illegal assessment by towns and cities, and the unauthorized expenditure by them of money raised by taxation. Under the provisions of Gen. Stats., c. 18, Sec. 79, immediate resort can be had by a suit of petition to this court, sitting in equity, to hear and decide concerning the validity of a proposed tax or the right to pay money from the treasury of a town, and any violation or abuse of the legal right and power of raising

[1] See *supra*, Sec. 616.

[2] Freeland v. Hastings, 10 Allen, 570, 575 (1865).

taxes and assessing them on the inhabitants, as well as of expending money belonging to a city or town, can be effectually restrained and prevented by injunction."

The principle thus declared should be applied to every form of taxation, whether Federal, State or municipal. The public as well as private interests will be best subserved by the speediest possible determination, through the preventive jurisdiction of a court of equity, or by special statutory procedure, properly regulated to protect the public interests, in every case where is involved the validity of an exaction from persons, property or business under the taxing power.

CHAPTER XIX.

ENFORCEMENT OF LIMITATIONS UPON FEDERAL TAXATION

§648. The remedial law in Federal and State taxation.
649. Federal taxes cannot be enjoined.
650. Suit against collector to recover taxes illegally or erroneously assessed.
651. Involuntary payment of taxes essential for recovery.
652. Requirements of the statute must be complied with.
653. Judgment against collector carries interest and costs.
654. Suits against the United States under the Tucker Act.
655. Procedure under the Tucker Act.
656. Where the judgment of the Court of Appeals is not final.
657. Limitations of actions.
658. Only party in interest can bring suit.
659. The recovery of duties illegally or erroneously collected.
660. The Federal procedure summarized.

§ 648. **The Remedial Law in Federal Taxation. —** The expansion of the Federal taxing power not only under the Income Tax Amendment, but in the extension of Federal taxation in national emergencies over the business and occupations of the people, which are also subject to State taxes, renders it proper to consider separately the remedial law whereunder the citizen is protected against the illegal or erroneous exercise of any form of Federal taxation. Such questions, whether concerning the constitutional validity of the tax, as in the Income Tax Cases,[1] or the more frequent cases of the construction of the tax laws and their application in specific cases, necessarily involve the Constitution or statutes of the United States and the exercise of the Federal authority thereunder, and therefore are only cognizable in the Federal courts and such courts, therefore, have jurisdiction irrespective of diverse citi-

[1] *Supra*, Sec. 620.

zenship.[1] Such a suit brought in the State court, is removable to the Federal court.[2]

The fundamental considerations which relate to the position of all taxing officials under our form of government, and applying both to the State and Federal government, have been set forth in the preceding chapter;[3] and only the subjects specially relating to the Federal officials and the enforcement of the Federal tax laws, will be here discussed.

§ 649. **Federal Taxes Cannot be Enjoined.**—The Federal statutes, applying only to taxes levied by Congress, provide:[4]

"No suit for the purpose of restraining the assessment or collection of any tax, shall be maintained in any court."

It was said by the Supreme Court,[5] that Congress had declared by this section that its officers should not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers in the course of general jurisprudence over the subject-matter in question have made the assessment, and claimed that it is valid. The only remedy in such case is that provided by Congress in an action at law to recover money claimed to have been illegally exacted.

Neither a Federal nor a State court has authority to stay the collection of a Federal tax. If an injunction restraining the assessment and collection of a national tax is granted by a State court it will be dissolved on removal of the case to the United States court.[6]

In the Income Tax cases[7] the question of procedure was waived and the collector was not enjoined from collecting the tax, but the defendant corporation was enjoined from paying the tax. The grave importance of a speedy determination of the validity

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1 Patton v. Brady, 184 U. S. 608, 46 L. Ed. 713 (1902).

2 City of Philadelphia v. Diehl, 5 Wallace 720, 18 L. Ed. 614 (1867); Venable v. Richards, 105 U. S. 636, 26 L. Ed. 1196 (1882).

3 *Supra*, Sec. 600.

4 R. S., 3224, Compiled Statutes, Sec. 5947; see also Sec. 616, *supra*.

5 Snyder v. Marks, 109 U. S. 189, 27 L. Ed. 901 (1884).

6 Kissenger v. Bean, 7 Bissell 60 (1875).

7 Sec. 620, *supra*.

of the tax involved was held to warrant what might seem an evasion of the statutory prohibition.[1]

§ 650. **Suit Against Collector to Recover Taxes Illegally or Erroneously Assessed.**—The remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of *assumpsit* against the collector for money had and received. Prior to the Act of March 3, 1887, known as the "Tucker Act" this was the only remedy. Where the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law or under duress, or with notice that he intends to bring suit to contest the validity of the claim, he may recover it back if the assessment was erroneous or illegal in an action of *assumpsit* for money had and received.[2]

This right of action, said the Supreme Court,[3] was virtually *ex contractu* though it was nominally in tort, and therefore as the case was from Virginia, the action survived both under the common law and the Virginia Code, and it was rightly revived against the executrix of the collector defendant.

This right of action against the collector is specifically regulated by the statute providing for the previous appeal to the commissioner of internal revenue, and for the reimbursement of the collector when probable cause is certified.[4]

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[1] Dodge v. Osborne, 43 App. D. C. (1915); Strauss v. Abrast Realty Co., 200 Fed. 327, D. of N. Y. (1917). In Frayser v. Russell, 3 Hughes 227 (1878), it was held that this statute had no application in the case where the collector undertook to make a levy for a tax which had been determined by the court not to be lawful, and an injunction was granted, restraining the levy. Dodge v. Brady, 240 U. S. 122, 60 L. Ed. 560 (1916).

[2] City of Philadelphia v. Diehl, *supra.*

[3] Patton v. Brady, *supra.*

[4] R. S. 989, Comp. Stat., Sec. 1635.

"When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him, and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or officer, or that he acted under the directions of the

The right to sue a collector does not include a successor of the collector who had no connection with the alleged unlawful act.[1] The statutory provision for the substitution of a successor in office only applies to actions commenced against the officer in his official capacity and there is no provision for the issuance of a certificate of probable cause by the court in such a case, as he is sued as an individual wrongdoer.

The judgment in such a case is a personal judgment against the collector, but it is provided by statute that when the court certifies that there was probable cause for the act done by the collector or that he acted under proper authority no execution issues against him, but the money recovered is provided for out of the proper appropriation from the treasurer. The refusal to grant such a certificate is not a matter which can be reviewed by writ of error, nor is the granting of the certificate a final judgment to which writ of error lies.[2] If no certificate is granted the judgment stands against the collector and personal execution can be issued thereon.

§ 651. **Involuntary Payment of Taxes Essential for Recovery.**—A payment of taxes unlawfully or erroneously assessed, which can be recovered by action at law, must be involuntary, that is, it must be made under duress, where there is an immediate and urgent necessity for the payment of the tax, so that it is in effect made under compulsion. The term "paid under protest" is used in legal as well as common parlance to express an involuntary payment. A protest, however, though a formal method of evidencing an involuntary payment, does not of itself establish that it is involuntary. It has been

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Secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or officer, but the money so recovered shall, upon final judgment, be provided for and paid out of the proper appropriations from the treasury."

[1] Roberts v. Lowe, 236 Fed. 604 (1916), S. Dist. of N. Y.; P. & H. R. R. Co. v. Lederer, 239 Fed. 184 (1917), E. D. of Pa.; *contra*, Armour v. Roberts, 151 Fed. 846 (1907).

[2] U. S. v. Frerichs, 106 U. S. 160, 27 L. Ed. 128 (1882).

termed a solemn declaration of opinion, and it was said by the Supreme Court that

"it plays the same part in internal revenue taxes which it does in customs cases; and it gives notice that the payment is not to be considered as admitting the right to make the demand."[1]

The law is thus summarized by the court:

"Where the party voluntarily pays the money he is without remedy; but if he pays by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action for money had and received."[2]

A payment of taxes may, therefore, be made with a formal protest and still be voluntary; and a payment may be involuntary, although formal written protest is not made.[3] The essential fact is that the payment should have been involuntary. This does not mean, however, that actual physical force must be used in enforcing payment, to constitute "duress," or involuntary payment. It has been held that every demand, clothed with official legal authority to make the demand, imposes a certain compulsion on the one upon whom the demand is made; and this is especially so in regard to payment of taxes, State and national.[4] A formal written protest, therefore, is a convenient means of evidencing the involuntary character of the payment;

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[1] Union Pac. R. R. Co. v. Dodge County Commissioners, 98 U. S. 541, 25 L. Ed. 196 (1879). In this case the payment of taxes made with a written protest of illegality and notice that suit for recovery would be brought, was held to have been voluntary. See also Gulbenkain v. U. S., 175 Fed. 860 (1909), where the term "absence of protest" was mentioned in the statute, Sec. 21 of Act, June 22, 1874, U. S. Comp. Stat., 1901, p. 1986.

[2] Philadelphia v. Diehl, 5 Wallace 731, *supra.*

[3] Written protest is required under the Customs Administrative Act on appeal to Board of General Appraisers, 6 Comp. Stat., Sec. 5595.

[4] Herold v. Kahn, 159 Fed. 608, C. C. A., 3d Cir. (1908), affirming 147 Fed. 745.

and it is therefore important in all cases, where the claim that the payment was involuntary is made, that it should be so evidenced; and it is clear that the absence of protest may warrant the inference that the payment was voluntary.

In an action to recover back revenue taxes, if plaintiff's allegation that the taxes were paid under protest is admitted by the plea, it is unnecessary to show the nature of the protest made.[1] It has also been held that a written protest is not necessary, and that a verbal protest is sufficient.[2]

Proof of payment under protest, that is, of an involuntary payment, is not required where recovery is sought of taxes authorized to be refunded by Act of Congress.[3]

§ 652. **Requirements of the Statute Must be Complied With.**—While a suit against a collector to recover taxes illegally or erroneously assessed, is the assertion of a common law right, the exercise of this right has been specifically regulated by Congress;[4] and under the statute, an appeal must be made to the Commissioner of Internal Revenue analogous to the ap-

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[1] Wright v. Blakesley, 101 U. S. 174, 25 L. Ed. 1048 (1880).

[2] Stewart v. Barnes, 153 U. S. 456, 38 L. Ed. 781 (1894).

[3] U. S. v. Jones, 236, U. S. 106, 59 L. Ed. 488 (1915); McCoade v. Pratt, 236 U. S. 59, L. Ed. 720 (1915).

[4] R. S. 3226, as amended, Act February 27, 1877, Ch. 69, Sec. 1; Comp. Stat., Sec. 5949.

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: Provided, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section."

R. S., 3227; Comp. Stat., Sec. 5950.

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any

peal to the Board of Appraisers in suits against the Collector of Customs. Thus, it was said by the Supreme Court, in a case where recovery was denied because of failure to comply with the statute in fixing the time for bringing the suit, that the United States had established a system of corrective justice as well as a system of taxation in both its Customs and Internal Revenue branches.[1]

"In the Customs Department it permits appeals from appraisers to other appraisers and, in proper cases, to the Secretary Treasurer; and if dissatisfied with this highest decision of the Executive Department of the government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and test in the courts the validity of the tax.

"So, also, in the Internal Revenue Department, the statute . . . allows appeals from the assessor to the Commissioner of Internal Revenue; and if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money

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sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: Provided, That actions for such claims which accrued prior to June 6, 1872, may be brought within one year from said date; and that where any such claim was pending before the commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

R. S., 3228; Comp. Stat., Sec. 5951.

"All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: Provided, That claims which accrued prior to June 6, 1872, may be presented to the commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

[1] Cheatham v. Collector, 92 U. S. 85, 23 L. Ed. 561 (1876), quoting from Nichols v. U. S., 7 Wallace 122, 19 L. Ed. 125.

was wrongfully exacted, the courts will give him relief by a judgment which the United States pledges herself to pay."

It has been uniformly held that this appeal to the Commissioner with evidence of the payment under protest, that is, of an involuntary payment, is essential to the prosecution of a suit against the collector.[1] The provision made for the payment of the judgment against the collector did not render this appeal to the Commissioner unnecessary.[2]

A written application to the Commissioner of Internal Revenue to refund the sum expended for the voluntary purchase of revenue stamps, to be affixed to a conveyance, though it might be sufficient to justify a favorable action by the Commissioner, is not equivalent to an appeal from an adverse decision by the Collector which was essential to the maintenance of a suit for the recovery of taxes alleged to have been illegally assessed. The court said that this requirement of a payment under protest in the form of an appeal to the Commissioner, was deemed necessary for the protection of the Government, as, without it, there would not be any evidence of involuntary payment in such cases.[3]

§ 653. **Judgment Against Collector Carries Interest and Costs.**—If the appeal to the Commissioner of Internal Revenue is successful and the claim is allowed there is no occasion for a suit, but if the claim is allowed by the Commissioner and reported for an appropriation, or if a recovery is had in the suit from the collector who is entitled, as provided in the statute, to reimbursement by the Government, this recovery carries with it interest and costs.

It was said by the court in a suit against a collector of customs:

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[1] Arnson v. Murphy, 115 U. S. 585, 25 L. Ed. 493 (1886); Kings County Savings Institution v. Blair, 116 U. S. 206, 29 L. Ed. 659 (1886).

[2] Christy Street Com. Co. v. U. S., 136 Fed. 236, C. C. A., 8th Cir. (1905); De Barry v. Dunne, Collector, 162 Fed. 961 (1908); Farrell v. U. S., 167 Fed. 639 (1909).

[3] Cheesborough v. U. S., 192 U. S. 253, 48 L. Ed. 432 (1904).

"Where an illegal tax has been collected the citizen who has paid it, and has been obliged to bring suit against the collector, is, we think, entitled to interest, in the event of recovery from the time of the illegal exaction."[1]

It was said by the Circuit Court of Appeals of the First Circuit[2] that the judgment was not one in form against the United States, though it was contended that the suit was one in substance against the United States, as the judgment was ultimately paid out of the treasury of the United States. The court said that the rule seemed to be established that interest was allowed.[3]

These rulings relate to the allowance of interest upon judgments against the Collector individually. A different principle applies where the judgment is rendered against the United States, under the concurrent jurisdiction vested in the district courts with the Court of Claims. As to such cases it is provided by statute that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. The Circuit Court of Appeals for the Fifth Circuit[4] ruled that Section 10 of the Act of March 3, 1887, known as the "Tucker Act,"[5] does not repeal or modify this section of the statute and does not allow the recovery of interest owing to judgments from the time of their rendition until an appropriation is made for their payment.

§ 654. **Suits Against the United States Under the Tucker Act.**—Prior to the Act of March 3, 1887, known as the Tucker Act, now incorporated in the Judicial Code,[6] the remedy above

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[1] Erskine v. Van Arsdale, 15 Wallace 75, 21 L. Ed. 63 (1872).

[2] Kinney v. Conant, 166 Fed. 720 (1900), affirming 162 Fed. 581.

[3] Schell v. Cochran, 107 U. S. 625, 27 L. Ed. 543; Tillson v. U. S., 100 U. S. 43, 25 L. Ed. 543 (1879).

[4] U. S. v. Barber, 74 Fed. 483 (1896).

[5] *Infra*, Sec. 654.

[6] Sec. 991, R. S.; Compiled Stat., Sec. 24 of Judicial Code, amended December 21, 1911. Sec. 24. The District Courts shall have original jurisdiction as follows: . . . Paragraph 20:

"Concurrent with the Court of Claims, of all claims not exceeding

described of suit against the collector was the only remedy provided and regulated by law for the unlawful enforcement of a collection of a tax.

Under this act, concurrent jurisdiction with the Court of Claims was vested in the Circuit, now District, Court of all claims not exceeding $10,000.00, not sounding in tort, wherein the party would be entitled to redress against the United States, if the United States were suable. In other words, the consent of the United States as a sovereign is thus given to suits against itself.[1]

$10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages liquidated or unliquidated in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States was suable, and of all setoffs, counterclaims, damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court. . . .

"And provided further, that no suit against the government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. . . .

"All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."

1 The provisions of the Act of March 3, 1887, regulating procedure in suits against the United States, are as follows:

Sec. 1574, Comp. Stat.: "The jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules thereof and of such additions and modifications thereof as said courts may adopt."

"Sec. 1575. The plaintiff in any suit brought under the provisions of the second section of this act, *supra*, shall file a petition, duly verified, with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the

This Act was not limited to suits for taxes illegally collected, but authorized the adjudication of several classes of claims against the United States in the Court of Claims and in the Circuit and District Courts. Jurisdiction over all these claims is vested in the Court of Claims, while the concurrent jurisdiction of the Circuit, now District, with the Court of Claims is limited to claims not exceeding $10,000.00.

Under this Act the plaintiff files a petition in the district where he resides, and service is made upon the District Attor-

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claim is based, the money or any other thing claimed, or the damage sought to be recovered, and praying the court for a judgment or decree upon the facts involved."

"Sec. 1576. Plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the District Attorney of the United States in the district where suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted, an affidavit of such service and the mailing of such letter. It shall be the duty of the District Attorney upon whom service of petition is made, as aforesaid, to appear and defend the interests of the government in the suit, and within sixty days after the service of petition upon it, unless his time shall be extended by order of the court made in the case, to file decree, answer, or demurrer on the part of the government, and to file a notice of any counterclaim, setoff, claim for damages, or other demand or defense whatsoever of the government in the premises: Provided, That should the District Attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court."

"Sec. 1577. It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts."

"Sec. 1578. Where the findings of fact and the law applicable thereto have been filed in any cause as provided in Sec. 6 of this act, and the judgment or decree is adverse to the government, it shall be the duty of the District Attorney to transmit to the Attorney-General

ney in the district, and a copy mailed by registered letter to the Attorney General, and an affidavit of this service and mailing filed with the clerk. The court files a written opinion, making specific findings of the fact and conclusions of the law; and if the judgment is adverse to the Government, it is the duty of the District Attorney to transmit to the Attorney General certified copies of the papers with his written opinion. Appeal must be taken within six months and interest is allowed at the rate of 4 per cent until the time when an appropriation is made for the payment of the judgment or decree. The jurisdiction of the District Court in such case, under this act, was sustained by the Supreme Court.[1]

This was a case involving the construction of the Corporation Tax Law of August 5, 1909, and this law provided that all laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable, should be extended to this tax.

In reply to the contention that the only remedy was by suit against the collector, the court said that as the United States received and kept the money and would indemnify the collector, the least that can be said was that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. The right to sue the collector for an unjustified collection was one given by the common law. The court in this

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of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court and his written opinion as to the same; whereupon the Attorney-General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the District Attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: Provided, That no appeal or writ of error shall be allowed after six months from the decree of judgment in such suit. From the date of final judgment or decree, interest shall be computed thereon at the rate of four per cent per annum, until the time when an appropriation is made for the payment of the judgment or decree."

(As to allowance of interest under this section, see Sec. 653, *supra.*)

[1] U. S. v. Emery, Bird & Thayer Realty Co., 237 U. S. 28, 59 L. Ed. 825 (1915), affirming 198 Fed. 242.

case cited the decision of the Circuit Court of Appeals of the Eighth Circuit,[1] where it was said by Judge Sanborn:

"The Acts of 1855 and 1887 here under consideration, mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals, is but the fast receding echo of the rule that the King can do no wrong. There are a few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it. There is no reason why a government should not submit its controversies with its subjects to adjudication, or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts, and to satisfaction of their wrongs, as universally as individuals."

§ 655. **Procedure Under the Tucker Act.**—Prior to the enactment of the Tucker Act of 1887 giving the District and Circuit Courts concurrent jurisdiction with the Court of Claims the Supreme Court had upheld the jurisdiction of the Court of Claims under the Act of 1855 over claims for erroneous or illegal exactions under the tax laws.[2] Since the enactment of the Tucker Act, however, the jurisdiction of suits for the recovery of taxes erroneously or illegally exacted have been uniformly sustained.

In reply to the objection that the claim was one "sounding in tort" especially excluded by that act, it has been uniformly held that the party complaining could waive the tort and sue upon the implied agreement of the Government to refund taxes illegally exacted. Furthermore, the claim was cognizable by the Circuit (District) Court as one arising under both the Constitution and laws of the United States. The acts therefore of

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1 Christy Street Commission Co. v. United States, 136 Fed. 326 (1905), affirming 129 Fed. 506.

2 U. S. v. Kaufmann, 96 U. S. 567, 24 L. Ed. 792 (1878), qualifying Nichols v. United States, 7 Wallace 122, 19 L. Ed. 125 (1868).

1855 and 1887 vest in the courts a complete jurisdiction of a cause of action upon a claim founded upon a law of Congress and upon and under the Constitution. The Commissioner of Internal Revenue was powerless to make or modify this congressional grant or to oust the jurisdiction of the court either by his inaction or by his rejection of the claim, and plenary power was vested in the Circuit (now District) Court to hear and determine it upon its merits.[1]

In one of the series of the insular cases[2] this subject was fully considered by the court in the prevailing opinion in relation to the jurisdiction of the court over the recovery of duties unlawfully exacted, and the court said that whether the exactions of the duties were tortuous or not and whether it was within the power of the importer to waive the tort, and bring suit in the Court of Claims for money had and received as upon an implied contract of the United States to refund the money in case, the exaction was illegal. The court said that the case was one within the first class of cases specified in the Tucker Act or a claim founded upon a law of Congress, namely, a revenue law, in respect of which class of cases the jurisdiction of the Court of Claims under the Tucker Act had been repeatedly sustained.[3]

As the jurisdiction of the Circuit (now District) Court is concurrent with the Court of Claims only in the case of claims not exceeding $10,000.00, the claims which involve more than $10,000.00 are within the jurisdiction of the Court of Claims alone, and the procedure therein is in accordance with the statute and rules regulating the jurisdiction pertaining to that court.

§ 656. **Where the Judgment of the Court of Appeals is Not Final.**—Where a suit is brought against the collector of the United States for the recovery of taxes unlawfully levied, and the Constitution and revenue laws are involved so that the Fed-

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1 Christie Street Com. Co. v. U. S., *supra*; Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397, 48 L. Ed. 496 (1904).

2 Dooley v. U. S., *supra*.

3 U. S. v. Finch, C. C. A., 7th Cir., 201 Fed. 905 (1912).

eral court has jurisdiction irrespective of citizenship, and other questions are also involved, the judgment of the Circuit Court of Appeals is not final, but the case is properly brought before the Supreme Court for review.[1] The court said the plaintiff was entitled to bring the suit directly to the Supreme Court from the trial court and at his election to go first to the Circuit Court of Appeals, but if he elected to go first to the Circuit Court of Appeals, he could not thereafter, if unsuccessful, prosecute a writ of error from the District Court to the Supreme Court, but the judgment of the Court of Appeals could be reviewed by the Supreme Court. Such a suit is not one arising under the revenue laws within the meaning of the Act of March 3, 1891, making the judgment of the Circuit Court of Appeals in such cases final. In this case the rights of the parties depended on plaintiff's showing of the constitutionality of the statute involved and the Constitution and application of the Federal Constitution. The suit in this case was against the collector individually, but the reasoning of the court would seem to apply if the case had been brought directly against the United States.

§ 657. **Limitation of Actions.**—Sec. 1 of the Tucker Act of 1887 provides that no suit against the Government of the United States shall be allowed under the act unless the same shall have been brought within six years after the right accrued within which the claim is made.[2] This statute, it will be remembered, included other classes of actions. The statutes concerning the enforcement of claims to recover taxes illegally collected,[3] made a limitation of two years. It was held by the Circuit Court of Appeals, Eighth Circuit,[4] that this specific limitation prescribed and limited the means by which one might recover from the United States internal taxes which had been illegally exacted. The adjustment of such claims was not the sole or primary sub-

[1] Spreckles Sugar Refining Co. v. McClain, *supra*.

[2] *Supra*, Sec. 654.

[3] *Supra*, Sec. 652.

[4] Christy Street Commission v. U. S., *supra*; Farrell v. U. S. (E. D. of Ark.), 167 Fed. 639.

ject of the Act of 1887, but it was a general law, passed for the purpose of conferring jurisdiction of actions upon certain courts of the United States. If Congress had declared that all actions allowed under it could be commenced at any time within six years after their respective cases accrued, there might be some basis for the contention that this worked a repeal of the two-year statute.

The court said that it was a familar rule of construction that specific legislation upon a particular subject is not affected by a general law upon the same subject, unless it clearly appears that the provisions of the two laws are so repugnant that the legislators must have intended by the latter to modify or repeal the earlier act. The court, therefore, concluded that the action was barred by the limitation of Sec. 3227, as it was not commenced until more than two years after the cause of action presented had accrued.

In the suit against a collector, it was held by the Circuit Court of Appeals, Second Circuit,[1] that the proviso in Sec. 3226, that if a decision of the Commissioner on Internal Revenue is delayed more than six months from the date of the appeal, then the suit may be brought without waiting for the decision of the Commission at any time within the period limited in the next section, was permissive only, and did not compel a claimant to bring a suit within two years and six months after taking an appeal in any case, but he could, at his election, await the decision of the Commissioner, and, if adverse, bring suit within two years thereafter, the court saying:

"The practice, as we construe the statute, is plain and simple. The party whose property, as he thinks, has been wrongly taken by the Collector, appeals to the Commissioner. If the latter official renders a decision against him, he must bring suit within two years from the date of such decision; but the decision may be unreasonably delayed, and the claimant may thus be deprived of his money for an indefinite period."[2]

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[1] Merck v. Treat, 174 Fed. 388 (1909).

[2] The court cited Arnson v. Murphy, 109 U. S. 238, 25 L. Ed. 920 (1883), and Wright v. Blakesley, 101 U. S. 174, 25 L. Ed. 1048 (1880),

§ 658. **Only Party in Interest Can Bring Suit.**—While it is recognized that the right of action against a collector to recover taxes or duties illegally collected, was a common law right, yet, in effect, it was taken away by the statute, and a statutory remedy given which was exclusive, that is, except as to the right to bring a suit against the United States directly under the Tucker Act. In whatever form the claims against the United States is asserted, that is, whether in the form of an action against the collector or directly against the Government, the action cannot be maintained by a stranger suing solely in virtue of a purchase of claims from those who did not see fit to prosecute it themselves.[1] This in accordance with the statute making unlawful the transfers and assignments of claims against the United States, which was enacted in view of the public policy which condemned speculative interests in such claims. The rule does not apply to devisees or representatives of the estates of deceased persons or assignees in bankruptcy under operation of law, who take by devolution of title, succeeding to the interest of the original party.[2] It does apply, however, to a contract given an attorney for one-half of all the money received by him for prosecuting claims. The court held that a restriction of compensation of attorneys for the collection of claims against the United States, also fell within this rule.[3]

This rule does not, however, apply to the purchaser of property which is involved in a claim, as the court said there was a clear distinction between the assignment of a claim, and the assignment of the thing which is the subject of a claim.

This requirement of a personal interest includes all claims against the Government in whatever form asserted.

§ 659. **The Recovery of Duties Illegally or Erroneously Collected.**—The general principle applicable to internal reve-

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sustaining this construction of the statute. See also Public Service Ry. Co. v. Herold, 219 Fed. 301 (1915), and also James v. Hicks, 110 U. S. 272, 28 L. Ed. 144 (1884).

[1] Hager v. Swain, 149 U. S. 242, 37 L. Ed. 719 (1893).

[2] See Ball v. Halsell, 161 U. S. 72, 40 L. Ed. 622 (1896).

[3] Seeberger v. Castro, 153 U. S. 32, 38 L. Ed. 624 (1894).

nue taxes, that is, the common law right of action against the collector, and the proceeding under the Tucker Act directly against the United States, apply to customs duties illegally or erroneously collected. The common law liability of the Collector of Customs, however, and the right of recovery against the United States based thereon, are largely controlled by the provisions of the Customs Administrative Act in the establishment of the Board of General Appraisers[1] and the Court of Customs Appeals.[2] No action, therefore, lies against the collector or the United States to recover duties paid where the matter is one within the purview of the Administrative Customs Act of 1890. Thus, by this Act an appeal is given from the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise to a Board of Appraisers. The Supreme Court said, in the Dooley case,[3] that this remedy was doubtless exclusive as applied to customs cases, but has no application to actions against the collector for duties exacted upon goods which were not subject to duties at all, and the court said that such cases, though arising under the revenue laws, are not within the purview of the Customs Administration Act, and as for such cases there is still a common law right of action against the collector.

In this case the court held that an action for duties illegally exacted upon imports from Porto Rico to New York, which were held not subject to duties, was properly brought against the United States within the meaning of the Tucker Act. Such cases, therefore, not falling within the purview of the Customs Administrative Act, may be brought by action against the collector or against the United States, as in the case of Internal Revenue taxes.

§ 660. **The Federal Procedure Summarized.**—The judicial procedure in the courts of the United States for the protection

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[1] Act of June 10, 1890, amended May 27, 1908, and May 5, 1909. Comp. Stat. 5593, etc.

[2] Judicial Code, 188-199. Amended Act of August 22, 1914. See *supra*, 651.

[3] *Supra.*

of the taxpayer against illegality or error in the administration of the Federal tax laws is applicable to every form of such taxation. The provision for direct suit against the United States in lieu of a personal action against the collector is based upon the same statutes[1] regulating the recovery of taxes requiring payment under protest, and prior application to the Commismissioner of Internal Revenue in case of internal taxation and the suit against the United States and the collector are subject to the same limitation of time,[2] and both forms of action are ultimately dependent upon the appropriation made by Congress for their satisfaction.

In case of duties illegally or erroneously exacted (where not within the purview of the Customs Administrative Act, *supra* Sec. 659), the personal action would be against the collector of customs, while a direct suit against the United States would be equally available. In the recent cases of the exercise of taxing power it has been specially provided by statute, that all laws relating to the collection, remission and refund of internal revenue taxes as far as applicable should be extended to the tax thereby levied.[3] It thus appears that the special statutory procedure thus provided by the laws of the United States is adapted to protect the taxpayer and the public against the illegal or erroneous exercise of the taxing power so far as it can be protected by other than preventive procedure, and it was shown in the Income Tax cases that, in the emergencies where preventive relief is necessary, such relief can be secured.

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[1] *Supra*, Sec. 652.

[2] *Supra*, Sec. 657. The only practical difference in the forms of actions seems to be in the allowance of interest, *supra*, Sec. 653.

[3] See Corporation Tax Law of August 5, 1909; Income Tax Law of 1913 and of 1916; Emergency War Legislation of 1917.

APPENDIX.

APPENDIX.

THE STATE TAXATION SYSTEMS.

The limitations of the taxing power of the States under the Federal Constitution necessarily involve a reference to the varying restrictions imposed by the State constitutions upon the legislative power of taxation, and to the exercise of the taxing power thus restricted in the States by both the State and Federal power. In some of the States there is no direct limitation in the State constitutions on the legislative power of taxation, except in the guarantee of due process of law, while in other States, particularly in the more recent constitutions, there is a detailed and specific regulation of the exercise of the taxing power.

At no time in the history of the country has there been such a wide extended discussion of taxing methods, or such legislative activity in the adoption of new forms of taxation, as in the past few years. Many of the State constitutions contain the requirement of equality and uniformity in taxation, while in others this requirement of uniformity is limited to the same class of subject within the territorial limits of the authority levying the tax. In the growing recognition of the ineffectiveness of the "general property" taxing system under modern conditions, which has found frequent expression in the judicial opinions heretofore cited, there has been a wide extended agitation, which still continues, to make the State taxing systems more effective by qualifying this requirement of uniformity, so as to permit classification of the different subjects of taxation. Such classification, when reasonable and natural, and not arbitrary, as we have already seen, is consistent with the equal protection of the laws guaranteed by the Federal Constitution. For examples of such classifications under the State constitutions permitting the same, see Michigan, Minnesota, Missouri, New York, North Dakota, and other states, *infra*. See also Ch. 15, *supra*.

This modern agitation in taxation is further illustrated in the adoption of income taxation in several States. It is notable in some States where this income taxation has been adopted as a means of revenue, that double taxation has been sought to be avoided by the exemption of the property from which the income is derived, when a tax is levied upon such income. This is a recognition of the principle declared in the income tax cases (*supra*, Sec. 560), that the taxation of the use of the property is in effect a taxation of the property itself.

In the case of the Federal income tax no such question arises as to the tax upon real property, as the Federal government levies a tax upon rents but not upon the land itself, under the authority of the Sixteenth Amendment, and it cannot levy a tax upon the land except under the rule of apportionment, which it has not applied.

The effective exercise of the Federal taxing power through the income tax has led many economists and publicists to favor the adoption of a similar income tax in the States, in lieu of and as a substitute for the present ineffectiveness of the system of taxing intangible personalty.

It will be seen that inheritance taxation has been adopted in nearly all the States; but that in a very few of them has there been any effort made by the exercise of interstate comity to avoid double taxation, when the owner of property and the property are located in different States.

It will also be noted that in nearly all the States, State tax commissions have been organized, in some States in addition to State Boards of Equalization.

There is a material difference in constitutions of the different States in the restrictions upon the legislative power of exemptions from taxation. In some States legislative exemptions are prohibited and all property is made subject to taxation except as specifically exempted in the constitution, while in others the legislature is authorized to make certain exemptions, and in a few the legislative power is unrestricted. The exemptions authorized in the several States illustrate differing views of public policy.

It will be observed that some of the constitutions are not

framed upon the recognized theory that the State legislative power is supreme in taxation except as limited by the State and Federal constitutions, as they contain specific grants of power to levy certain forms of tax as poll tax, licenses and inheritance taxes and the like, and in a few cases, power to make special assessments for local improvement is specifically granted in the State constitution. These latter provisions, however, seem to have been made in view of prior decisions in such States holding that such methods of taxation were inconsistent with the constitutional requirement of equality and uniformity in taxation.

In some States there has been a separation more or less complete of the sources of State and municipal revenues, thus allowing municipalities and local taxing districts to determine for themselves the subject of taxation. Such separation, as also the matter of classification already referred to, requires the repeal of constitutional provisions requiring taxation of all property under uniform rules throughout the State.

It has been the aim to make this summary of State systems of taxation as accurate as the investigation of available sources permitted, and as comprehensive as space allows, yet it is obvious that in the nature of things such summaries are not sufficient for the investigation of close and involved questions of statutory construction, and those interested therein should seek official or professional sources of local information. It should also be remembered that constitutional amendments are pending in some of the States and that agitation for further legislative changes in tax laws is pending in nearly all of them. Nor was it deemed wise to attempt to state all the specific rates of taxation, as these are usually subject to change at any legislative session, but to give a fair outline of the system of taxation prevailing.

On this subject of the taxation systems of the different States reference should be made to the special reports, on the taxation of corporations in the different States by the Commissioner of Corporations in the Department of Commerce, published at intervals from 1909 to 1915, as to the different sections of the country, with a special report on taxation of corporations in

1912, and reference is also made to the review of the taxation and revenue systems of the State and local governments, published by the Bureau of Census in the Department of Commerce in 1912. Many important changes, however, have been made in the taxing systems of some of the States since these governmental publications.

Reference is also made to the review of State legislation in the proceedings of the National Tax Association, published annually.

ALABAMA

(Constitution went into effect November 28, 1901.)

Sec. 91. The legislature shall not tax the property, real or personal, of the State, counties or other municipal corporations, or cemeteries; nor lots in incorporated cities or towns, or within one mile of any city or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable.

Sec. 92. The legislature shall by law prescribe such rules and regulations as may be necessary to ascertain the value of real and personal property exempted from sale under legal process by this constitution, and to secure the same to the claimant thereof as selected.

Art. VIII, Sec. 178. (The payment of a poll tax is made a condition precedent of the right to vote. This poll tax, by Sec. 194, is to be $1.50 upon each male inhabitant over the age of twenty-one and under the age of forty-five years, who was not, when the constitution was adopted, exempt by law, but the legislature is authorized to increase the maximum age to not more than sixty years. No legal process is allowed for the collection of the poll tax, and any payment of the poll tax by another or the advancement of money for that purpose is made to constitute bribery. Under Sec. 259, the proceeds of all the poll taxes are applied to the support of the public schools.)

Art. XI, Sec. 211. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hired during the current year of such rental or hire, if such real or personal property be assessed at its full value.

Sec. 212. The power to levy taxes shall not be delegated to individuals or private corporations or associations. (Under Secs. 214, 215 and 216 the rates of tax in the State, counties and cities are specifically limited.)

Sec. 217. The property of private corporations, associations and individuals of this State shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational or charitable purposes.

Sec. 218. The legislature shall not have the power to require counties or other municipal corporations to pay any charges which are now payable out of the State treasury.

Sec. 219. (Authorizes the legislature to levy a collateral inheritance tax of not more than two and one-half per cent on all estates, real and personal, in the State, transferred by will or the intestate laws of the State.)

Art. XIV, Sec. 269. (A special county tax, specifically limited in rate, is authorized for the support of public schools.)

REVENUE ACT OF 1915.—Alabama in 1915, by the General Revenue Act approved September 14, 1915, and its General Licensing Act of the same date, codified and re-enacted the revenue system of the State. References are to these acts of 1915.

STATE BOARD.—A State Board of Equalization was established, composed of a chairman and two associate members appointed by the government to devote their entire time to duties of their office, to exercise general and complete supervision over the valuation, equalization and assessment and collection of taxes, and perform all the duties theretofore performed by the State Tax Commission, with power to correct the assessment of any county. This board has complete supervision over the local assessments, with power to readjust and equalize the assessments of any class of property in the county and precincts of the State. It is also the duty of the State Board to assess for taxation public carriers and public utilities, also the franchises and intangible property and assets of such corporations, and these values are apportioned to the counties wherein any part of these properties are located.

CORPORATIONS.—All business corporations, whether foreign or domestic, other than banks, pay to the State an annual franchise tax of forty cents on each thousand of its paid-up capital. Foreign corporations pay this tax on the amount of capital actually employed in the State. In ascertaining this franchise tax of foreign corporations, however, deduction is made from the capital employed in the State of the aggregate amount of loans secured by mortgage on real estate wherein the mortgages have paid the recording tax provided by law. See Revenue Act, Sec. 16. (As to application of this corporation franchise tax to railroad corporations, see *supra*, Sec. 199.)

Corporations, as individuals, are also subject to the general property tax, and the shares of business corporations are not separately taxed unless the aggregate assessment of their shares exceeds the aggregate value of the real and personal property returned by the

corporation for taxation. Revenue Act, Sec. 14. Corporations also, whether foreign or domestic, pay the special privilege tax, assessed in carrying on the occupation or business in which the corporation may be engaged.

BANKS.—Shares of stock are assessed at reasonable value, less assessed value of real estate.

COUNTY BOARDS.—There is a County Board of Equalization composed of three freeholders, one of whom is appointed by the Court of County Commissioners, one by the State Board of Equalization and these two appoint the third.

If the County Board of Equalization is dissatisfied with the changes and corrections ordered by the State Board of Equalization, provision is made for arbitration.

LICENSES.—Every person or corporation engaged in any business or occupation specified in the statute, and a great variety of occupations are so specified, is made subject to a license or privilege tax specified in the statute. See License Act of 1915. This license taxation is enforced by prosecution for doing business without a license. There is also levied for the use in any county of the State a license or privilege tax of 50 per cent of the State license except in the cases where the amount of the county licenses is specifically fixed by the act, or it is provided that no county license is paid.

In this license tax law is also provided a mortgage recording tax of 15 cents on each $100.00 to be paid by the lender, of which tax one-third is paid to the county and two-thirds to the State. The payment of this tax exempts the mortgage from further tax during the term.

There is no inheritance tax.

POLL TAX.—A poll tax is levied of $1.50 on every male inhabitant over the age of twenty-one and under the age of forty-five years, except in persons permanently disabled and whose taxable property does not exceed $500.00. This tax is applied exclusively in aid of the public school fund of the counties in which the tax is levied and collected.

ASSESSMENT.—All property, whether of individuals or corporations, is assessed for taxation at 60 per cent of its "fair and reasonable cash value." Revenue Act, Sec. 9.

EXEMPTIONS.—There is a comprehensive system of exemptions, including public property, bonds of the State and all county and municipal bonds issued in the State, household goods, wearing apparel, family portraits and farm equipment to a specified extent, and the

property of deaf mutes and insane and blind persons of the value of one thousand dollars, agricultural products in the hands of the producer, and manufacturers' products in the hands of the manufacturer, provided the property is named upon the assessment list returned under oath. Also all shipbuilding plants in the erection and construction and equipment for which not less than one hundred thousand dollars shall have been *bona fide* expended, together with all machinery equipment, etc., are exempted from all taxation for a period of ten years.

COLLECTION.—Taxes are assessed as of October 1st of each year and the assessment finished by February 1st, when the tax becomes delinquent, 5 per cent being added. The assessment roll delivered to the Judge of Probate by the first Monday in May. All taxes become due October 1st and are delinquent January 1st thereafter, when they draw interest at 8 per cent.

A certificate of purchase is given when the land is sold for taxes, and the same is subject to redemption in two years when deed is given. which is *prima facie* evidence of the recitals therein.

ARIZONA

(Constitution adopted 1911.)

Article IX, Sec. 1. The power of taxation shall never be surrendered, suspended, or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only.

Sec. 2. There shall be exempted from taxation all Federal, State, county and municipal property. Property of educational, charitable and religious associations or institutions not used or held for profit may be exempted from taxation by law. Public debts, as evidenced by the bonds of Arizona, its counties, municipalities, or other subdivisions, shall also be exempt from taxation. There shall further be exempt from taxation the property of widows, residents of this State, not exceeding the amount of $1,000, where the total assessment of such widow does not exceed $2,000. All property in the State not exempt under the laws of the United States or under this Constitution, or exempted by law under the provisions of this section, shall be subject to taxation to be ascertained as provided by law.

Sec. 12. The law-making power shall have authority to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance; legacy and succession taxes, also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes, stamp, registration, production, or other specific taxes.

The Enabling Act passed Congress (Act of June 20, 1910), accepted by the State in its Constitution, provided, Sec. 20:

"That the lands and other property belonging to citizens of the United States residing outside said State shall never be taxed at a higher rate than property belonging to the residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to, or which might hereafter be acquired by the United States, or reserved for its use; but nothing herein or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned and held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by such a State so long and to such extent as Congress has prescribed or may hereafter prescribe."

ADMINISTRATION.—There is a State Tax Commission of three members, elected by the people, who also constitute a State Board of Equalization, with comprehensive powers of investigation and equalization of all the property in the State. (See Civil Code, Title 49, ch. 1 and 2). The State Tax Commission also assesses taxable property of railroads, excepting real estate and personal property not used in continuous operation of the railroad; and also such property of express companies, telegraph and telephone companies, sleeping car companies and patented and unpatented producing mines. Local assessments are reviewed and equalized by the county board of supervisors acting as a Board of Equalization, with an appeal therefrom to the court.

RAILROADS.—The valuation of railroads is apportioned to the counties and taxing units where the taxes are collected in the same way and at the same rate as those upon property in the hands of individuals. Street railways are taxed in the same way as property of individuals.

CORPORATIONS.—Telephone and telegraph companies are taxed in the same manner as railroads, while express companies are taxed by the State upon their gross receipts from business done within the State at the rate of 6 per cent in lieu of all other taxes upon the property of such companies. An annual registration fee is imposed upon railroads and all corporations for privilege of doing business in the State.

BANKS.—Shares of stock are assessed to holders, less value of corporate property directly assessed, and tax is paid by bank.

MERCHANTS.—When merchants are incorporated they pay the State Corporation Tax; and they also pay, whether individual or corporate, the general property tax on merchandise assessed according to inventory.

EXEMPTIONS.—By Act of 1917, observatories for astronomical research maintained at private expense, but for public welfare, and not for profit, and money and funds used for the same were exempted from taxation. See also exemptions specified in Constitution.

INHERITANCE TAX.—There is an inheritance tax on estates valued at not less than $10,000.00; and inheritances of $5,000.00 or less are exempted. The tax rate is 1 per cent to lineals, 2 per cent to collaterals, and in other cases it varies from 3 per cent to 6 per cent, according to amount. It applies all to property within the jurisdiction of the State, whether belonging to inhabitants of the State or not.

PROCEDURE.—Property is assessed at full cash value, which is defined as the price at which property would sell by voluntary offer for sale by the owner thereof, upon such terms as such property is usually sold, and not the price which might be realized if such property were sold at a forced sale.

LIVE STOCK.—Provision was made by Act of 1917 for the collection of taxes upon transient herds of live stock coming in from neighboring States to graze temporarily within Arizona.

POLL TAX.—There is no State poll tax, neither is there any county nor city poll labor tax. There is a school tax of $2.50 annually on each male inhabitant of the State over twenty-one and under sixty years of age, excepting members of volunteer fire departments and National Guard, paupers, and persons of disability. There is also a road tax of two dollars annually on male inhabitants between the same ages; and in incorporated cities and towns a tax for street purposes of the same amount on male inhabitants between the same ages.

MINES.—Mines and mining claims are taxed in the same manner as other real estate.

STOCK AND BONDS.—Shares of stock in domestic companies are not taxable; but bonds both domestic and foreign are.

ASSESSMENTS.—The taxpayer is allowed to deduct his liabilities from the assessment of his solvent debts. By act of 1917, the offices of city assessor and tax collector were abolished, and provision made that assessments for cities should be made by the county assessor and the taxes collected by the county tax collector. There is one assessment of State, county, city and incorporated town taxes by county assessors and for the equalization thereof by the County Board of Assessors.

COLLECTION.—Taxes upon land and personal property become a lien on the first Monday in January. Taxes are payable one-half the

first Monday in October, becoming delinquent the second Monday in December; and the other half, the second Monday in March, becoming delinquent the first Monday in June, with addition of 4 per cent penalty after taxes are delinquent.

Taxes on real estate, including mining property, are collectable by suit, the procedure being adopted from that of Missouri. See Missouri, *infra*. (Also see case of Arizona *ex rel.* v. Copper Queen Consolidated Mining Company, *supra*, Sec. 374.)

ARKANSAS

Art. XVI, Sec. 5. All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper. Provided, further, that the following property shall be exempt from taxation: Public property used exclusively for public purposes; churches as such; cemeteries used exclusively as such; school buildings and apparatus, libraries and grounds used exclusively for school purposes and buildings and grounds and material used exclusively for public charity.

Sec. 6. All laws exempting property from taxation other than as provided in this constitution shall be void.

Sec. 7. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State may be a party.

Sec. 8. The General Assembly shall not have power to levy State taxes for any one year to exceed in the aggregate 1 per cent of the assessed valuation.

Sec. 11. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; and no moneys arising from a tax levied for one purpose shall be used for any other purpose.

Sec. 13. Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

There is a tax limitation of one per cent for the State, one-half per cent for general county purposes, and seven per cent for schools.

TAX COMMISSION.—A State Tax Commission, consisting of three members appointed by the Governor, created in 1909, assesses railroads and other public utilities upon other than their tangible property, not part of right of way or operating property which is subject to local

assessment; and the Tax Commission also is charged with the duty of equalizing the property of the State. By Act of March 17, 1917, the Commission was given the power to raise or lower the values in any county or any subdivision of any county, or the values of any individual taxpayer in any county, so as to make the assessment uniform throughout the State. A penalty of $500.00 for each offense is prescribed for assessors who omit taxable property from their lists, or who fall below the standard of value certified to them by the Commission.

(It was held in State *ex rel.* v. Meek, 192 S. W. Rep. 202, 1917, that the words "according to value" in the Constitution did not mean full valuation, and that mandamus would not lie at instance of a creditor to compel an officer to make tax assessments disturbing the equalization fixed by the State Board, the State Supreme Court declining to follow the contrary ruling of C. C. A., Eighth Circuit, 222 Fed. 497, 1915, a case in the same State. See Sec. 552, *supra.*)

RAILROADS.—Railroads and carriers, including express, sleeping car, telegraph, telephone and pipe line companies, assessed as above, pay the general property tax, and in addition they pay the State, for State purposes, the capital stock tax, *infra.* The assessment by the State Board includes the franchise value.

FREIGHT CAR COMPANIES.—These companies pay a tax of five cents upon gross receipts for business done in the State as found by the State Commission, and in addition pay the capital stock tax.

FOREIGN CORPORATIONS are taxed on property in the State, and pay the capital stock tax as domestic corporations of same class.

INHERITANCE TAX.—The Inheritance Tax is imposed, to which all property within the State is subject, including the estates of non-residents in shares of stocks and bonds of domestic corporations, and on that proportion of the value of such property held in foreign corporations, which the physical property located in the State bears to the total physical property wherever located. Estates not exceeding $1,000.00 are not subject to the tax. There is an exemption of $5,000.00 when the property passes to husband or wife, or lineal ancestor or descendant. Rates are graded according to relationship of inheritor and amount of inheritance.

(Attorney-General of State should be consulted as to amount of assessment.)

CORPORATION TAXES.—A franchise tax of one-tenth of one per cent is assessed upon the paid-up and outstanding capital stock of all corporations which is employed in Arkansas. The franchise tax on

insurance companies doing business in the State is $50.00 on all mutual companies having no capital stock, and on stock companies $100.00 where the capital stock is less than $500,000.00, and $200.00 on those having a greater capital stock than $500,000.00. These franchise taxes are paid directly to the State Treasurer. The intangible property of corporations is taxed at the general property rate at a fifty-cent valuation. This capital stock tax is supplemental to the general property tax levied on property of corporations and individuals.

There is also a tax of 2½ per cent on the net premiums paid by insurance companies for doing business in the State.

BANKS—Banks are taxed upon the value of the shares, less the value of tangible property assessed in the State, not including exempt property. (See First National Bank v. Board of Equalization, 92 Ark. 335.) Business corporations other than banks are assessed on the value of the capital stock, less the amount of tangible property in the State which is actually assessed, no deduction being made for property located outside of the State and assessed in such other jurisdiction. See State v. Bodcaw Lumber Co., 194 S. W. 692. Stockholders are not required to return for assessment their portion of capital stock of company which is assessed for taxation in the State.

EXEMPTIONS.—Exemptions are declared in the Constitution. (Art. XVI, Sec. 5, *supra*.) (For a list of privilege and license taxes, see statute.)

COLLECTIONS.—Taxes are payable between the first Monday in January and the 10th of April of the year succeeding the assessment, subject to a penalty of 25 per cent if not paid within the time required. Lands returned as delinquent are sold by the collector on the second Monday in June, and are bid in by the State if no one pays the amount of the taxes, penalties and costs. Lands so sold may be redeemed within two years, provided that minors, insane persons and persons in confinement have the same time for redemption after removal of their disability. Between grantee and grantor the lien attaches from the first Monday in December. Assessments are made by the State Tax Commission on the first Monday in June and reports must be filed during May. Pullman car, express, private car lines and telegraph lines are assessed the first Monday in July and required to report every two years.

The statute authorizing suit for recovery of back taxes from corporations, held valid in State *ex rel.* v. Railroad Co., 117 Ark. 606.

A constitutional convention is called to meet in November, 1917.

CALIFORNIA

Revenue and Taxation.

Article XIII, Sec. 1. All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *provided*, that a mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof, together with the money represented by such debt, shall not be considered property subject to taxation; *and further provided*, that property used for free public libraries and free museums, growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation, except such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; *provided*, that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any county, city and county, or municipal corporation, not exempt from taxation, shall be assessed by the assessor of the county, city and county, or municipal corporation in which said lands or improvements are located, and said assessment shall be subject to review, equalization and adjustment by the State Board of Equalization. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State. (Amendment adopted November 3, 1914.)

Exemption on Account of Military Service.

Sec. 1¼. The property to the amount of one thousand dollars of every resident in this State who has served in the army, navy, marine corps, or revenue marine service of the United States in time of war, and received an honorable discharge therefrom; or lacking such amount of property in his own name, so much of the property of the wife of any such person as shall be necessary to equal said amount; and property to the amount of one thousand dollars of the widow resident in this State, or if there be no such widow, of the widowed mother resident in this State, of every person who has so served and has died either during his term of service or after receiving honorable discharge from said service; and the property to the amount of one thousand dollars of pensioned widows, fathers, and mothers, resident in this State, of soldiers, sailors, and marines who served in the army, navy, or marine corps, or revenue marine service of the United States, shall be exempt from taxation; *provided*, that this exemption shall not apply to any person named herein owning property of the value of five thousand dol-

lars or more, or where the wife of such soldier or sailor owns property of the value of five thousand dollars or more. No exemption shall be made under the provisions of this act of the property of a person who is not a legal resident of this State. (New section adopted October 10, 1911.)

Exemption of Church Property.

Sec. 1½. All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship shall be free from taxation; *provided*, that no building so used which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation. (New section adopted November 6, 1900.)

Exemption of State and Municipal Bonds.

Sec. 1¾. All bonds hereafter issued by the State of California, or by any county, city and county, municipal corporation, or district (including school, reclamation, and irrigation districts) within said State, shall be free and exempt from taxation. (New section adopted November 4, 1902.)

Exemption of College Property.

Sec. 1a. Any educational institution of collegiate grade, within the State of California, not conducted for profit, shall hold exempt from taxation its buildings and equipment, its grounds within which its buildings are located, not exceeding one hundred acres in area, its securities and income used exclusively for the purposes of education. (New section adopted November 3, 1914.)

Land and Improvements Separately Assessed.

Sec. 2. Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality and similarly situated, shall be assessed at the same value.

Method of Assessment of Land Sectionized and Not Sectionized.

Sec. 3. Every tract of land containing more than six hundred and forty acres, and which has been sectionized by the United States Government, shall be assessed, for the purposes of taxation, by section or fractions of sections. The Legislature shall provide by law for the assessment in small tracts of all lands not sectionized by the United States Government.

Exemption of Vessels.

Sec. 4. All vessels of more than fifty tons burden registered at any port in this State and engaged in the transportation of freight or passengers, shall be exempt from taxation except for State purposes, until and including the first day of January, nineteen hundred thirty-five. (New section adopted November 3, 1914.)

Contract Impairing Power of Taxation Forbidden.

Sec. 6. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party.

Payment of Real Property Taxes by Installments.

Sec. 7. The Legislature shall have the power to provide by law for the payment of all taxes on real property by installments.

Taxpayer's Annual Property Statement.

Sec. 8. The Legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at twelve o'clock meridian on the first Monday of March.

State and County Boards of Equalization.

Sec. 9. A State Board of Equalization, consisting of one member from each congressional district in this State, as the same existed in eighteen hundred and seventy-nine, shall be elected by the qualified electors of their respective districts, at the general election to be held in the year one thousand eight hundred and eighty-six, and at each gubernatorial election thereafter, whose term of office shall be for four years; whose duty it shall be to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation. The Controller of State shall be ex officio a member of the board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; *provided*, such State and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to county assessments, and under such rules of notice as the State board may prescribe as to the action of the State board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; *provided*, that no board of equalization shall raise any mortgage, deed of trust, contract or other obligation by which a debt is secured, money, or solvent credits, above its face value. The present State Board of Equalization shall continue in office until their successors, as herein provided for, shall be elected and shall qualify. The Legislature shall have power to redistrict the State into four districts, as nearly equal in population as practical, and to provide for the elections of members of said Board of Equalization.

Property, Where Assessed.

Sec. 10. All property, except as otherwise in this Constitution provided, shall be assessed in the county, city, city and county, town or township, or district in which it is situated, in the manner prescribed by law. (Amendment adopted November 8, 1910.)

Exemption of Personal Property.

Sec. 10½. The personal property of every householder to the amount of one hundred dollars, the articles to be selected by each householder, shall be exempt from taxation. (New section adopted November 8, 1904.)

Income Tax May be Levied.

Sec. 11. Income taxes may be assessed to and collected from persons, corporations, joint-stock associations, or companies resident or doing business in this State, or any one or more of them, in such cases and amounts, and in such manner, as shall be prescribed by law.

No Poll Tax to be Levied.

Sec. 12. No poll tax or head tax for any purpose whatsoever shall be levied or collected in the State of California. (New section adopted November 3, 1914.)

Exemption of Certain Trees and Vines.

Sec. 12¾. Fruit and nut-bearing trees under the age of four years from the time of planting in orchard form, and grapevines under the age of three years from the time of planting in vineyard form, shall be exempt from taxation, and nothing in this article shall be construed as subjecting such trees and grapevines to taxation. (New section adopted November 6, 1894.)

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Legislature to Provide for Enforcement.

Sec. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article.

Basis of Taxation for State Purposes.

Sec. 14. Taxes levied, assessed and collected as hereinafter provided upon railroads, including street railways, whether operated in one or more counties; sleeping car, dining car, drawingroom car and palace car companies, refrigerator, oil, stock, fruit, and other car-loaning and other car companies operating upon railroads in this State; companies doing express business on any railroad, steamboat, vessel or stage line in this State; telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity; insurance companies; banks, banking associations, savings and loan societies, and trust companies; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for State purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word "companies" as used in this section shall include persons, partnerships, joint stock associations, companies, and corporations.

(*a*) All railroad companies, including street railways, whether operated in one or more counties; all sleeping car, dining car, drawingroom car, and palace car companies, all refrigerator, oil, stock, fruit and other car-loaning and other car companies, operating upon the railroads in this State; all companies doing express business on any railroad, steamboat, vessel or stage line in this State; all telegraph and telephone com-

panies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the State a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, right of way, and other property, or any part thereof used exclusively in the operation of their business in this State, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies, and each thereof within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State, and a proportion, based upon the proportion of the mileage within this State to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this State.

The percentages above mentioned shall be as follows: On all railroad companies, including street railways, four per cent; on all sleeping car, dining car, drawingroom car, palace car companies, refrigerator, oil, stock, fruit, and other car-loading and other car companies, three per cent; on all companies doing express business on any railroad, steamboat, vessel or stage line, two per cent; on all telegraph and telephone companies, three and one-half per cent; on all companies engaged in the transmission or sale of gas or electricity, four per cent. Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided; provided, that nothing herein shall be construed to release any such company from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this State.

(*b*) Every insurance company or association doing business in this State shall annually pay to the State a tax of one and one-half per cent upon the amount of the gross premiums received upon its business done in this State, less return premiums and reinsurance in companies or associations authorized to do business in this State; provided, that there shall be deducted from said one and one-half per cent upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this State. This tax shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided; provided, that when by the laws of any other State or county, any taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligations or prohibitions, are imposed on insurance companies of this State, doing business in such other State or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of money, or of securities, or other obligation or prohibitions, imposed upon insurance companies of such other State or country, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the Legislature upon insurance companies of such other State or country doing business in this State.

(c) The shares of capital stock of all banks, organized under the laws of this State, or of the United States, or of any other State and located in this State, shall be assessed and taxed to the owners or holders thereof by the State Board of Equalization, in the manner to be prescribed by law, in the city or town where the bank is located and not elsewhere. There shall be levied and assessed upon such shares of capital stock an annual tax, payable to the State, of one per centum upon the value thereof. The value of each share of stock in each bank, except such as are in liquidation, shall be taken to be the amount paid in thereon, together with its pro rata of the accumulated surplus and undivided profits. The value of each share of stock in each bank which is in liquidation shall be taken to be its pro rata of the actual assets of such bank. This tax shall be in lieu of all other taxes and licenses, State, county and municipal, upon such shares of stock and upon the property of such banks, except county and municipal taxes on real estate and except as otherwise in this section provided. In determining the value of the capital stock of any bank there shall be deducted from the value, as defined above, the value, as assessed for county taxes, of any real estate, other than mortgage interests therein, owned by such bank and taxed for county purposes. The banks shall be liable to the State for this tax and the same shall be paid to the State by them on behalf of the stockholders in the manner and at the time prescribed by law, and they shall have a lien upon the shares of stock and upon any dividends declared thereon to secure the amount so paid.

The moneyed capital, reserve, surplus, undivided profits and all other property belonging to unincorporated banks or bankers of this State, or held by any bank located in this State which has no shares of capital stock, or employed in this State by any branches, agencies, or other representatives of any banks doing business outside of the State of California, shall be likewise assessed and taxed to such banks or bankers by the said Board of Equalization, in the manner to be provided by law and taxed at the same rate that is levied upon the shares of capital stock of incorporated banks, as provided in the first paragraph of this subdivision. The value of said property shall be determined by taking the entire property invested in such business, together with all the reserve, surplus, and undivided profits, at their full cash value, and deducting therefrom the value as assessed for county taxes of any real estate, other than mortgage interests therein, owned by such bank and taxed for county purposes. Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, upon the property of the banks and bankers, mentioned in this paragraph, except county and municipal taxes on real estate and except as otherwise in this section provided. It is the intention of this paragraph that all moneyed capital and property of the banks and bankers mentioned in this paragraph shall be assessed and taxed at the same rate as an incorporated bank, provided for in the first paragraph of this subdivision. In determining the value of the moneyed capital and property of the banks and bankers mentioned in this subdivision, the said State Board of Equalization shall include and assess to such banks all property and everything of value owned or held by them, which go to make up the value of the capital

stock of such banks and bankers, if the same were incorporated and had shares of capital stock.

The word "banks" as used in this subdivision shall include banking association, savings and loan societies and trust companies, but shall not include building and loan associations.

(*d*) All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the State.

(*e*) Out of the revenues from the taxes provided for in this section, together with all other State revenues, there shall be first set apart the moneys to be applied by the State to the support of the public school system and the State University. In the event that the above named revenues are at any time deemed insufficient to meet the annual expenditures of the State, including the above named expenditures for educational purposes, there may be levied, in the manner to be provided by law, a tax, for State purposes, on all the property in the State including the classes of property enumerated in this section, sufficient to meet the deficiency. All property enumerated in subdivisions *a*, *b*, and *d* of this section shall be subject to taxation, in the manner provided by law, to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, before the adoption of this section. The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes for State purposes.

(*f*) All the provisions of this section shall be self-executing, and the Legislature shall pass all laws necessary to carry this section into effect, and shall provide for a valuation and assessment of the property enumerated in this section, and shall prescribe the duties of the State Board of Equalization and any other officers in connection with the administration thereof. The rates of taxation fixed in this section shall remain in force until changed by the Legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof. The taxes herein provided for shall become a lien on the first Monday in March of each year after the adoption of this section and shall become due and payable on the first Monday in July thereafter. The gross receipts and gross premiums herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March. Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section; and all laws in relation to such taxes in force at the time of the adoption of this section shall remain in force until changed by the Legislature. Until the year 1918 the State shall reimburse any and all counties which sustain loss of revenue by the withdrawal of railroad property from county taxation for the net loss in county revenue occasioned by the withdrawal of railroad property from county taxation. The Legislature shall provide for reimbursement from the general funds of any county to districts therein where loss is occasioned in such dis-

tricts by the withdrawal from local taxation of property taxed for State purposes only.

(*g*) No injunction shall ever issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection of any tax levied under the provisions of this section; but after payment action may be maintained to recover any tax illegally collected in such manner and at such time as may now or hereafter be provided by law. (New section adopted November 8, 1910.)

The system of taxation is set forth in the Constitution, including the organization of the State Board of Equalization and its powers of assessment and equalization, the exemptions and the scheme of separation of the sources of State and local taxation and the taxation of public and other franchises fully detailed therein.

PUBLIC UTILITIES.—The Act of 1917 amending the Political Code Secs. 3664, etc., was enacted to carry into effect the provisions of the Constitution for the separation of State and local taxation. Public carriers are assessed by the State Board upon their operating properties, which are specifically defined in the statute, and the tax is levied upon the gross receipts and operation of such companies in the State. The rates fixed by the Act of 1917 are as follows: Upon railroads including street railways, 5.25 per cent; on sleeping car, dining car, drawing-room and palace car companies 3.95 per cent; on express companies 9 per cent; telegraph and telephone companies 4.2 per cent; gas and electric companies 5.6 per cent, and all other franchises 1.2 per cent. These taxes are all paid into the State and are in lieu of all other taxes and licenses State and local except as provided in the Constitution, Sec. 14, Art. XIII.

INSURANCE CO.'S.—Insurance companies pay an annual tax of 2 per cent upon the amount of gross premiums for business done in the State less return premiums and reinsurance in companies in the State, but the amount of any county or municipal taxes paid upon companies of real estate in the State is deducted.

BANKS.—The rate of assessment upon bank stocks is 1.16 per cent, which is paid to the State and is in lieu of all other taxes and licenses, county and municipal, except upon real estate, and the assessed value of real estate assessed for county taxes is deducted.

In the enforcement of these State taxes reports are required to be filed with the State Board, and in case of insurance companies with the Insurance Commission.

CORPORATION LICENSES.—Under the Act of May 10, 1915, amended in 1917, a license tax is fixed upon corporations engaged in business in the State whether domestic and foreign (other than the public utilities, insurance companies and banks), and are taxed upon their authorized capital stock $10 where it does not exceed $10,000; $15 where the capital exceeds $10,000 and does not exceed $20,000; $20 when it does not exceed $50,000; $25 when it does not exceed $100,000; $50 where it does not exceed $250,000; $75 when it does not exceed $500,000; $100 where it does not exceed $1,000,000; $200 where it does not exceed $3,000,000; $350 where it does not exceed $5,000,000; $550 where it does not exceed $7,500,000; $800 where it does not exceed $10,000,000 and when it exceeds $10,000,000, $1,000. When the capital stock of any corporation has no par value the tax is $100. When part of the stock has a par value and part has no par value, the tax is computed upon such par value stock in accordance with the admeasurement schedule sum to which is attached the sum of $50. Building loan companies and associations pay an annual license tax of $10. These taxes become due and payable to the Secretary of State on the first day of January and become delinquent on the first Monday of February. Foreign and domestic companies pay the same tax.

The Secretary of State, State Comptroller and members of State Board of Control constitute a corporation license tax exemption board and hear and determine claims of exemption from this tax. Corporations are subject to be suspended from doing business in the State for non-payment of this tax, and the license tax is a lien upon the real property of the corporation from the first day of January until paid.

ASSESSMENT.—Under provisions of the Constitution amendment of 1910, a deduction of debts due to bona fide residents is made in the assessment of solvent creditors, and mortgages on property in the State are exempt.

Water ditches constructed for mining, manufacturing or irrigating purposes and wagon or turnpike toll roads privately owned are assessed the same as real estate. Taxable property is subject to county and city taxation at its true cash value annually and the assessment refers to noon of the first Monday in March. Certain cities and towns may have a separate valuation as a basis for municipal taxes.

INHERITANCE TAX.—The inheritance tax is levied upon all property in the State passing under will or intestacy, including personal property situated outside of the State passing from any resident by will, and upon all property within the State including stock in corporations

passing from any non-resident. The collection of the tax is under the superintendence of the State Comptroller. The rate of the tax depends upon the relation of the beneficiary and upon the amount received varying from 1 per cent up to $25,000 on the first class consisting of husband, wife, lineal issue, lineal ancestor or adopted child to 5 per cent on the fourth class consisting of remote relatives and strangers in blood, etc., above $1,000,000. For details of the rate in these classes, see Political Code. Bequests in trust for charitable or benevolent purposes are exempt from any succession tax. The widow or minor child has an exemption of $24,000, and those in the first class of relatives $10,000, second class $2,000, third class $4,000 and the fourth class $500.

STATE ASSESSMENTS.—These assessments by the State board are due and payable on the first Monday of July in each year, and one-half becomes delinquent on the sixth Monday after the first Monday in July and 15 per cent is added to the amount thereof, and one-half is paid prior to the first Monday in February and an additional 5 per cent is added.

The statute declares that shares of stock possess no intrinsic value over and above the actual value of the property of the corporation, and that the assessment of the shares and the corporate property would be double taxation.

GENERAL SYSTEM.—Under the separation of State from local taxation the public utilities, except the water companies, and also banks, have been segregated for the State, while all other property is taxed locally, and for seven years there has been no State *ad valorem* tax on property in general, the revenues from the segregated sources being sufficient for the support of the State. (For discussion of the California system, see report of special tax commissioner of 1916 and a review of same by Prof. Carl C. Plehn, Professor of Finances, University of California, 2nd Bulletin, National Tax Ass'n., p. 248.)

COLLECTION.—Taxes upon personal property are a lien upon any real estate of the same owner. General taxes are payable on the first Monday in October and become delinquent on the first Monday in December, but the taxpayer may pay one-half of his taxes on or secured by real estate on the third Monday in October and the remaining one-half on the third Monday in January. The property is returned delinquent in June and sale is made to the State on not less than twenty-one or more than twenty-eight days' notice. A redemption may be made by the owner or any party in interest within five years after the date of the sale on payment of taxes with 7 per cent interest and costs.

COLORADO

(Constitution as amended in 1912. Article X.)

Art. X, Sec. 3. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Mines and mining claims bearing gold, silver, and other precious metals (except the net proceeds and surface improvements thereof) shall be exempt from taxation for the period of ten years from the date of the adoption of this Constitution, and thereafter may be taxed as provided by law. Ditches, canals, and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed, so long as they shall be owned and used exclusively for such purpose.

Sec. 4. The property, real or personal of the State, counties, cities, towns and other municipal corporations, and public libraries, shall be exempt from taxation.

Sec. 5. Lots, with buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools, or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law.

Sec. 6. All laws exempting from taxation property other than hereinbefore mentioned, shall be void.

(Sections 7 to 14 are the general provisions concerning the relations of the municipalities to the State in the exercise of the taxing power, and limit the right of taxation to four mills on each dollar of valuation.)

15. (Constitutes the Governor, State Auditor, State Treasurer, Secretary of State, and Attorney-General, a State Board of Equalization; and the Board of County Commissioners, the County Board of Equalization in each county.)

"The duty of the State Board of Equalization shall be to adjust and equalize the valuation of real estate and personal property among the several counties, and the duty of the County Board of Equalization shall be to adjust and equalize the valuation of real and personal property within their respective counties. Each board shall perform such other duties as may be required by law."

Amendment of 1912. "There shall be a State Tax Commission consisting of three members to be appointed by the governor by and with the consent of the Senate. The duty of said commission shall be to adjust, equalize, raise or lower the valuation of real and personal property among the several counties of the State. There shall be in each county in the State a County Board of Equalization consisting of the Board of County Commissioners of such county. The duties of the County Board of Equalization shall be to adjust, equalize, raise or lower the valuation of real and personal property within their respective counties, subject to revision, change, and amendment by the State Tax Commission. The State Tax Commission and County Boards of Equalization shall also perform other duties as may be prescribed by law."

(The repeal of Amendment 12, concerning State Tax Commission, was defeated at election of 1916.)

16. (Provides that appropriations by the General Assembly shall not exceed the tax provided by law to pay the same.)

STATE BOARD.—The State Board of Equalization, and Board of County Commissioners, and the State Tax Commission, as provided in the Constitution, are established with powers detailed by statute. The Tax Commission assesses the operating property of railroads, cars and public utilities, and also of other classes of business continuing in two or more counties. The Tax Commission makes an annual report to the Governor. It has extensive powers in the investigation, supervision and equalization of the county assessments. (See People *ex rel.* v. Pitcher, 156 Pac. Rep. 812.)

RAILROADS.—Railroads are subject to the general property tax, being assessed as to operating property by the Tax Commission, and by local assessors as to other property. They are also subject to the State corporation tax. The value assessed by State Commission is apportioned to the counties according to mileage. The value of railroad property is determined as an entirety, and apportioned to the mileage located in the State.

PUBLIC UTILITIES.—The same method is applied to the taxation of car companies, express, telegraph, telephone and other companies assessed by the State Board. The assessment is apportioned to the counties where located, and the companies are also subject to State corporation tax.

CORPORATION LICENSE TAX.—The annual corporation license tax, levied solely for State purposes, is at the rate of two cents per each $1,000 of capital stock; same tax of four cents as to entire capital stock of foreign corporations was adjudged invalid by Supreme Court (*Supra*, Sec. 182) as a violation of contract as to corporations theretofore admitted. The statute has been since amended so that a tax of two cents is made to apply to foreign corporations only as to property located and employed in the State. Corporations both foreign and domestic are also subject to the general property tax on their property.

BUSINESS COMPANIES.—The same rule applies to assessment of business companies. The average value of money invested in merchandise and manufactures and also as to moneys and credits during each calendar month is used as a basis of assessment of merchants and manufacturers. (See R. S. 5579-5580.)

BANKS.—Shares of stock are assessed at location of bank, value of real estate is deducted. Tax is paid by bank. Residents must list average amount of deposits in and out of State.

INHERITANCE TAX.—The graduated inheritance tax and the amount exempted are regulated by the degree of relationship of the inheritor to the decedent. A life estate, or an interest for a term of years in an estate, pays an inheritance tax. Taxes are levied for the fiscal year ending November 30th.

The inheritance tax law applies to all property belonging to a resident of the State and all property located in the State belonging to a non-resident at the time of his death which passes by will or intestate laws as above. It also applies to such transfer of securities of Colorado corporations owned by non-residents.

MINES.—Mine owners must make an annual return showing the acreage, the number of tons and the value of ore extracted, the cost of extraction, transportation and treatment and the net proceeds after deducting expenses. Mills, machinery and superstructures on the surface of the mines are separately taxed. The value of mines is assessed on one-fourth of its gross proceeds after the assessor has made the statutory deductions. The above mining assessment method applies only to mines producing gold, silver, lead, copper or other precious metals. Iron mines, coal mines, mines producing asphaltum and idle mines are assessed in the same manner as other property.

EXEMPTIONS.—Exemptions are declared in the Constitution. *Bona fide* debts (with specified exceptions, R. S. Sec. 5584), may be deducted from credits.

STOCKS AND BONDS.—Shares of domestic corporations are not taxable, but shares of foreign corporations are taxable. Bonds of both domestic and foreign companies are taxable.

DITCHES AND CANALS.—Ditches and canals used only by their owners are exempted from taxation, but those ditches and canals from which water is sold are not so exempted. (See also Sec. 5 of Art. X of Cons., *supra.*)

ASSESSMENTS.—Property is assessed annually. Land and improvements are separately assessed. Money of non-residents if kept within State for profit or investment, is subject to same taxes, as property of residents.

Every person is required to make a return to the assessor of taxable property owned or controlled by him, between the first of April and the 20th of May of each year. Co-partnerships are treated as individuals, but each partner is liable for the entire taxes assessable. One-half of the assessed taxes are payable on the last day of Feb-

ruary and one-half on the last day of July in the year following the assessment. Interest at the rate of 1 per cent per month is charged on the amount of the assessment from March 1st until the first day of August, at which time all taxes become delinquent, and interest is charged thereafter at the rate of 15 per cent per annum.

COLLECTIONS.—Between the first day of August and the first day of September of each year the county treasurer is required to make a list of all lands and town lots which are subject to sale for the non-payment of taxes. Taxes are assessed as of Oct. 1, and are payable on call of collector in April to July following.

Taxes are a perpetual lien on real estate, and land may be sold for taxes but is redeemable within three years upon payment of the purchase money with interest at the rate of 24 per cent per annum for the first six months, 18 per cent for the second six months, and 12 per cent thereafter, and the additional amount of taxes which have been paid by the purchaser together with 12 per cent thereon.

There is a statute which allows to minors and insane persons, one year after their minority or disability has been removed, for the redemption of property.

CONNECTICUT

(In Connecticut the constitution contains no restraint upon the taxing power of the State Legislature other than the guaranty of "due course of law.")

APPORTIONMENT.—As there are no constitutional limitations in Connecticut, all the provisions relative to taxation are statutory; and after thorough investigation of the subject by special commission (see address of ex-Governor Baldwin before New England Tax Officials' Association, December 7, 1916, reported in Vol. 2, Bulletin of National Tax Association, p. 61) important tax measures were adopted in 1915. The State tax in the amount fixed by the legislature is apportioned to towns of the State in proportion to the total revenue collected in the towns, on the theory that the actual amount of taxes collected bears a comparative relation to the actual worth of property in the towns.

ADMINISTRATION.—The State Board of Equalization, consisting of the Treasurer, Comptroller and the Tax Commissioner *ex officio*, has jurisdiction over the local assessments and equalizes and adjusts the same. The State Tax Commissioner is charged with certain administrative duties and has many of the functions of State tax com-

missions in other States. The same officials form a part of a Board of Finance whose main duties are to frame a budget for legislation.

CORPORATIONS.—Foreign and domestic corporations pay a tax upon their property in the State, and, in addition thereto, pay an income tax of 2 per cent on net income, which is based upon the information required to be furnished by such corporations to the federal government for the payment of the Federal Income Tax, a duplicate copy of this report being furnished, the State having the right to investigate and examine the books of the corporation when necessary to confirm the report.

RAILROADS.—The gross earnings tax on railroads of 3 per cent on their earnings in the State is substituted for the former method of taxation on valuation of their property. Street railway companies pay 4½ per cent of their gross earnings. The securities of any railroad company whose property is taxed in the State are exempt from taxation.

PUBLIC UTILITIES.—Gas, electric, water and power companies pay a tax to the State of 2 per cent on net income, with a proportionate reduction if part of the income is received from earnings out of the State.

Loans secured by mortgage on real estate in the State are exempt from taxation to an amount equal to the assessed valuation of the real estate. For any excess of the loan over that value, the lender is taxed in the town where the land lies.

BANKS.—National banks pay a tax on individual deposits at a rate of one-fourth of 1 per cent in lieu of a tax upon such property by the individual depositors at the regular State and local rate. (As to such tax, see Vermont, *infra*.) The stock of banks is taxed 1 per cent on market value of shares, less amount of taxes paid upon real estate in the State.

INHERITANCE TAX.—There is a new inheritance tax (1917), with graded rates and exemptions varying from 1 per cent for lineal heirs to 8 per cent for strangers in excess of one million dollars.

Connecticut taxes all property within the jurisdiction of the State which has been held to include that residuum of the decedent's property remaining after the claims of creditors and charges of administrator have been satisfied. The words include land within the State belonging to any decedent with all of the property of a decedent domiciled here but can not include personal property in this State which belongs to a non-resident decedent (Appeal of Gallup, 76 Conn. 617). Property to the value of $10,000 is exempt.

EXEMPTIONS.—Exemptions include wearing apparel, with watches and jewelry not exceeding $25.00; household furnishings up to $500.00; cash up to $100.00; private libraries up to $200.00; musical instruments up to $25.00.

POST MORTEM TAX.—The former tax rate of four mills per annum on choses of action and securities, is supplemented by what is termed a *post mortem* law, whereby estates of decedents are made liable for the taxes of five years preceding if not paid, or for such portion of said time as the securities have been in the possession of the deceased, the burden being upon the estate to show that the property had been taxed or recently acquired. The proceeds of this tax are paid one-half to the State and one-half to the town where the deceased resided.

COLLECTION.—The time of assessment varies in different towns and cities. With the exception of a few towns, returns are made by taxpayers during the month of October. There is a right to appeal by taxpayers to the Board of Relief and to the courts, if the justice of the assessment is in question. Taxes are paid in the following April or July when called by the collector. Interest at 9 per cent is added. The lien for unpaid taxes is foreclosed as in the case of a mortgage.

(For recommendations for further legislation made by Special Tax Commission, see report of same for 1917.)

DELAWARE

Art. VIII, Sec. 1. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the general assembly may by general laws exempt from taxation such property as in the opinion of the general assembly will best promote the general welfare.

Sec. 5. The general assembly shall provide for levying and collecting a capitation tax from every male citizen of the State of the age of twenty-one years or upward; but such tax, to be collected in any county, shall be uniform throughout that county, and such capitation tax shall be used exclusively in the county in which it is collected.

Sec. 7. In all assessments of the value of real estate for taxation, the value of the land and the value of the buildings and improvements thereon shall be included. And in all assessments of the rental value of real estate for taxation, the rental value of the land and the rental value of the buildings and the improvements thereon shall be included. The foregoing provisions of this section shall apply to all assessments of the value of real estate or of the rental value

thereof for taxation for State, county, hundred, school, municipal or other public purposes.

Art IX, Sec. 6. Shares of the capital stock of corporations created under the laws of this State, when owned by persons or corporations without this State, shall not be subject to taxation under any law now existing or hereafter to be made.

Art. X, Sec. 3. Provided . . . all real and personal property used for school purposes, where the tuition is free, shall be exempt from taxation and assessment for public purposes.

ADMINISTRATION.—The tax system of Delaware is one of complete separation of the sources of revenue, the State deriving its revenue from corporation, income and inheritance taxes, fees and licenses on various occupations, there being no State levy on property. The counties, cities and hundreds depend on the general property tax and on poll taxes.

While there was a Special Revenue and State Taxation Commission appointed in 1909, which made reports in 1909 and 1910, the permanent tax administrative machinery of the State consists of a Collector of State Revenue appointed by the Governor, a Levy Board composed of commissioners in varying number in each of the three counties, a Board of Revision and Assessment in each District, and the Collectors in each hundred.

RAILROADS.—The railroad taxation is unique, in that the State revenues are derived, not from the taxes imposed, but from the commutation in amounts fixed by the statute, which the railroads accept in lieu of the taxes. The taxes thus superseded consist of a passenger tax of ten cents for each passenger, which was adjudged invalid as to interstate business (State v. P. W. & B. R. Co., 4 Houston 158), a tax on net earnings, on rolling stock and also on capital stock. These taxes are, however, superseded by the commutation referred to. For history and explanation of this commutation system, see Report of State Revenue and Taxation Commission in 1909.

PUBLIC UTILITY CORPORATIONS.—Telegraph, telephone, cable and express companies pay an annual tax of one per cent on gross receipts from business done in Delaware. Gas and electric companies, or companies distributing heat or power, pay an annual tax of two-fifths of one per cent on their gross receipts in the State and four per cent on dividends in excess of four per cent declared and paid during the preceding year. Oil and pipe line companies pay an annual tax of three-fifths of one per cent on gross receipts from transportation of oil in the State during the preceding year. Parlor, palace and

sleeping car corporations pay an annual tax of one and one-half per cent on the gross amount of receipts in Delaware during the year preceding. See Tax Laws, Sec. 68.

BANKS are taxed upon capital stock and surplus in valuation of shares less real estate.

INSURANCE COMPANIES.—Insurance companies other than life pay an annual tax of three-fourths of one per cent on gross receipts from premiums of insurance collected in Delaware during the preceding year. Life insurance companies pay an annual tax of two per cent on gross premiums received from premiums in Delaware.

BUSINESS CORPORATIONS.—Corporations other than those named, that is, business corporations, pay an annual license fee based on the authorized capital stock of $5.00 when the stock does not exceed $25,000.00; $10.00 when it does not exceed $100.000.00; $20.00 when it does not exceed $300,000.00; $25.00 when it does not exceed $500,000.00, and $50.00 when not exceeding $1,000,000.00, and a further sum of $25.00 for each additional million or part thereof. Stocks without par value are regarded as $100.00 par value for taxation purposes. Inactive companies not engaged in any business are required to pay one-half of the usual tax, but not less than $5.00 per year.

MANUFACTURING AND MERCANTILE COMPANIES.—Manufacturing and mercantile companies whose capital is invested in business carried on in Delaware and subject to a license tax for carrying on such business, are exempt from the franchise tax, and any corporation with fifty per cent of its capital invested in business carried on in the State is exempt. Corporations having less than fifty per cent of their capital invested in business in the State are entitled to a deduction of the invested capital from the amount of capital issued and outstanding. By act of 1911 a tax of one-twentieth of one per cent is assessed upon manufacturing companies upon the aggregate value of the property thereof within the State used for production and manufacture. The corporate taxes above stated are collected by suit or by forfeiture of charter, and by fine or imprisonment of persons attempting to act under forfeited charters. The Governor may correct errors made in the tax charges. The corporation taxes named do not apply to corporations organized before March 1, 1899.

INCOME TAX.—An income tax was adopted in 1917, whereunder a tax of one per cent of the net income over $1,000.00, other than on life insurance policies, interest upon obligations of the State or any political subdivision thereof, or of the United States, or rentals or

grains or profits derived from agricultural operations. In the computation of the income tax, the following items are deducted: The necessary expenses of carrying on the business, interest, taxes, losses not compensated by insurance, debts charged off as worthless, and allowances for exhaustion or wear and tear of property.

Return for the income tax is made on or before the first day of March, 1918, and each year thereafter. Taxes are to be paid to the State Treasurer on or before the first day of June following. A party not making the return is subject to a penalty and fine and imprisonment, and the State Treasurer enforces the payment of the taxes by suit.

INHERITANCE TAX.—An inheritance tax was also adopted in 1917, applying to all property in the State whether belonging to a resident or a non-resident, except shares of the capital stock of a corporation created under the laws of the State when owned by persons without the State. The rate is fixed according to the degree of the relationship and the amount of the inheritance, varying from one per cent to four per cent in the case of parents, children, husband or wife, according to the amount of inheritance, the latter part applying to the amount in excess of $200,000.00, $3,000.00 being exempt; and in the case of brother or sister and their descendants $1,000 being exempt; the rate varies from two per cent to eight per cent, the latter rate applying to the amount in excess of $200,000.00. Devises to charitable, educational, agricultural and religious societies or for public use, are exempt from this tax. It also applies to transfers made in contemplation of death within two years.

STATE AND LOCAL TAXATION.—It is made the duty of the administrator of the laws to collect these taxes, and to make a return thereof to the State Treasurer. The taxes above named are paid over to the State. The general property tax is levied for the benefit of the counties, cities and hundreds. The corporations are also subject to license taxes imposed by the cities under the authority of the statute. A poll or capitation tax is imposed upon the citizens of the county who are twenty-one years old and over, of not more than one dollar and twenty-five cents nor less than twenty-five cents. There is also a per capita tax in some of the cities levied upon horses and mules.

EXEMPTIONS.—Exemptions include the provisions necessary for the use and consumption of the family not including livestock, farming utensils, working tools of mechanics, professional and trade implements, stock on hand of a manufacturer or tradesman, household furniture other than plate, wearing apparel, grain and the produce

of land, vessels trading from any part of the State, charitable homes for reformed women to the value of $25,000, homes for incurables to the value of $15,000, soldiers' rest rooms, lands and buildings of incorporated college fraternities to the value of $10,000, lands and tenements of Young Women's Christian Association homes to the value of $25,000. Railroad property within the right of way is exempt as the railroads are otherwise taxed for State purposes. Shares of stock in domestic corporations which are owned by persons or corporations without the State are exempt.

ASSESSMENT.—Lands and buildings are assessed jointly every four years. Homes and lots in cities are assessed on the basis of annual rental at $100 for every $12.00 rental plus any excess of true value thereover. Rents are assessed by the assessor in each hundred at the rate of $100 for each $8.00 received and are assessed to the persons receiving the same. Tenants pay the taxes on the rents and deduct the same from rents due. Personal property is assessed once every four years but corrected annually for new acquisitions and changes.

COLLECTION.—Taxes are collected by the collectors in each hundred under warrant of the levy court. They are payable on demand after the second Tuesday in October and if not paid within ten days after demand, may be collected by distress and sale of personal property. If the amount of personal property is not sufficient they revert to real estate and tenement and if they fail, the individual may be imprisoned. The Collector may recover taxes in an action of debt. On all taxes paid before the first day of October there is an abatement of 5 per cent; before December 1, 3 per cent; on all taxes unpaid on the first day of January 5 per cent penalty is added.

FLORIDA

Art. IX, Sec. 1. The legislature shall provide for a uniform and equal rate of taxation and shall provide such regulations as will secure a just valuation of all property both real and personal, excepting such property as may be exempted by law for municipal, educational, library, scientific, religious or charitable purposes.

Sec. 5. The legislature may provide for levying a special capitation tax, and a tax on licenses. But the capitation tax shall not exceed one dollar a year, and shall be applied exclusively to common school purposes.

Sec. 8. No person or corporation shall be relieved by any court from the payment of any tax that may be illegal, or illegally or irregularly assessed, until he or it shall have paid such portion of his or its taxes as may be legal, and legally and regularly assessed.

Sec. 9, Art. IX amended to read as follows:

There shall be exempt from taxation property to the value of five hundred dollars to every widow that has a family dependent on her for support, and to every person who is a *bona fide* resident of the State and has lost a limb or been disabled in war or by misfortune.

ADMINISTRATION.—A tax commission composed of three members appointed by the Governor was established in 1913, the commissioners giving their entire time to the duties of their office. It has no assessing power but exercises general supervision over the administration of the tax laws, may conduct investigations and make recommendations. There is no power to equalize taxes between the counties.

A "State board" composed of the State Comptroller, Attorney General and State Treasurer assesses steam and street railroad, passenger car and telegraph companies.

County commissioners constitute the county Board of Equalization with power to equalize property within their respective counties. The taxpayers may appeal to the county commissioners from assessment made by county assessors.

RAILROADS, ETC.—Railroad, express companies, telephone and telegraph companies are also subject to the general property tax, and in addition are subject to State license taxes; in the case of railroads $10.00 for every mile of track, express companies to a State license tax of $7,500.00 and a municipal license tax based upon population, telephone companies to a State license tax based upon number of instruments, and telegraph companies to a State license tax based upon mileage.

CORPORATIONS.—Other public utility companies pay the general property tax for State and local purposes and in addition pay the State for State purposes annual license taxes fixed in the statute. See Laws of 1913. Car companies pay the general property tax and in addition the State license tax to the State based upon gross receipts. Laws of 1913. Secs. 44, 45. Manufacturing, mercantile and other business corporations pay the general property tax assessed and collected locally for State and local purposes and in addition they pay annual license taxes to the State for conducting certain kinds of business specified in the statute. Laws of 1913, Act No. 1, and counties and cities, unless specially prohibited, may impose a license tax not exceeding 50 per cent of the license charged for State purposes.

Insurance companies pay a tax of 2 per cent upon the gross amount receipts of premiums from policy holders in the State and each company is required to pay $200 license tax except plate glass insurance companies which pay only $50.00.

Holders of stock in any incorporated company are not taxed if the stock is returned for taxation by the corporation, or if the property of the company is assessed where located taxes are then paid on such property. Laws of 1907, Act No. 1, Sec. 1.

LICENSE TAXATION.—Florida supplements the general property tax with a long series of special or privilege or occupation taxes which are charged for the conduct of business and are in addition to the general property tax paid by both individuals and corporations.

BANKS.—Banks are assessed upon their shares, the real estate being taxed as other real estate, and deducted from assessment of the shares, the bank being made the agent of the stockholders for the payment of the tax.

POLL TAX.—Any male over 21 and under 50 years of age except those who have lost a limb in battle, is liable to a poll tax of $1.00 which is collected for school purposes. There is also a road poll tax in each county on all able-bodied persons over 21 and under 45 resident in the county over 30 days, except ministers of the gospel in charge of congregations. This tax is payable in labor. Persons residing in incorporated municipalities are not subject to such tax.

Cities make their own assessment of property for taxation but the valuation must not exceed the last valuation thereof for State taxation.

COLLECTION.—Assessments are made as of the first of January. Taxes are due on the first Monday in November, and become delinquent on the first Monday in April.

When a purchaser at a tax sale goes into actual possession of land, no suit can be brought by the former owner, or its representative for recovery unless within four years from the beginning of such possession.

When land is in actual adverse possession of any person other than tax purchaser, the purchaser must bring suit for possession within one year after acquiring the right for tax title, else he is barred, provided that infants, persons of unsound mind or under guardianship or in prison may commence suit within three years after disability is removed.

GEORGIA

Art. IV, Sec. 1, Par. 1. The right of taxation is a sovereign right, inalienable, indestructible, is the life of the State, and rightfully belongs to the people in all republican governments, and neither the General Assembly, nor any nor all other departments of the government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts whatsoever by said government, or any department thereof, to effect any of these purposes, shall be, and are hereby, declared to be null and void for every purpose whatsoever, and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract whatsoever by the General Assembly.

Art. VII, Sec. 2, Par. 1. All taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly, may, however, impose a tax upon such domestic animals as, from their nature and habits, are destructive of property.

Par. 2. The General Assembly may by law exempt from taxation all public property; all places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning; the real and personal estate of any public library, and that of any other literary association used by or connected with such library; all books and philosophical apparatus; and all paintings and statuary of any company or association kept in a public hall and not held as merchandise or for purposes of sale or gain: Provided, That the property so exempted be not used for purposes of private or corporate profit or income.

Art. VII, Sec. 1. (Contains a specific designation of the purposes for which taxes may be levied: for the support of the government, public institutions, educational purposes, the public debt, the suppression of insurrection and invasion and defending the State in time of war, and also for the assistance of disabled Confederate soldiers and for their widows and orphans.)

Par. 3. No poll tax shall be levied except for educational purposes, and such tax shall not exceed one dollar annually upon each poll.

Par. 4. All laws exempting property from taxation other than the property herein enumerated, shall be void.

Par. 5. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party.

Sec. 6, Par. 2. (The right of local taxation limited to elementary educational purposes, building and repairing bridges, enforcement of criminal law, support of quarantine, paupers, sanitation and payment of existing debts.)

Art. VIII, Sec. 4, Par. 1. (The General Assembly may authorize a county school tax.)

ADMINISTRATION.—(References are to Code of 1910 unless otherwise indicated.)

A Tax Commissioner was authorized (Acts of 1913, p. 123), appointed for six years. He has no original assessing power, but equalizes assessments between the counties and has powers of investigation and recommendation. The Comptroller-General, elected every two years, assesses the property, including franchise value of public carriers, and has power to make regulations therefor, and to recommend improvements. Disputes with respect to assessment of taxes, arising between corporations and the Comptroller-General, or between taxpayers and county boards of tax assessors, are subject to arbitration. (See Code 1045, 1046, Laws of 1913, p. 123.)

Boards of County Assessors are appointed by County Commissioners.

CORPORATIONS.—All corporations, domestic and foreign, are subject to the General Property Tax for State and local purposes. The tax collected from public service corporations, under the General Property Tax, for State purposes, is paid to the State. Corporations pay, in addition to the General Property Tax, an annual license or occupation tax known as the Capital Stock Tax. Foreign corporations which have a place of business in the State, except insurance and sewing machine companies, which are otherwise taxed, pay this tax for State purposes to the Comptroller-General. Mercantile, manufacturing, and other business corporations pay also for State purposes an annual license tax levied for conducting the specific class of business. (See Code, Secs. 922-984.)

RAILROADS.—Railroads of all kinds and also express companies are assessed by the Comptroller-General in practically the same manner. What is known as located property is deducted from the entire value of the system as a unit apportioned to the State by capitalization of net earnings of 6 per cent, consideration also being given to the value of securities, and the remainder is taken as the value of the franchise. The value ascertained is apportioned to the counties, cities, or towns on the basis of the value of the tract or other located property in each.

Car companies pay the State for State purposes a General Property Tax in addition to the capital stock tax.

Telephone, telegraph, electric light and power, gas and water companies, all pay the General Property Tax and also the Capital Stock Tax; and they are assessed by the Comptroller-General.

Business corporations pay locally the General Property Tax and also the capital stock tax, and also whatever license taxes are imposed under the General License Tax or that of the county, city, and town where the company is operated. Foreign corporations are taxed in a similar manner as domestic corporations.

BANKS.—Shares of stock in banks are assessed to owners—less value of real estate.

COUNTY TAXATION.—Counties and municipalities do not share in corporation tax except that the cities may collect a tax on insurance companies at a certain percentage of gross premium receipts.

INHERITANCE TAX.—The inheritance tax enacted in 1913 provides a tax of one dollar on any amount in excess of $5000.00 passing to the parent, husband, or wife, child, brother or sister, or wife, or widow of a son or any adopted child, or child born in lawful wedlock, at the rate of one per cent on any amount in excess of $5000.00; and where the property passes to any other person, the rate of 5 per cent. (See Act of 1913.)

This tax is assessed upon all property, real and personal, and upon every estate or interest therein within the jurisdiction of the State, whether belonging to residents or non-residents, which passes as above stated.

POLL TAX.—There is an annual poll tax of one dollar on every male person between the ages of 21 and 60 years, except blind persons and those who have lost a limb or the use of the same while actually engaged in the military service of the Confederacy, the proceeds being used for educational purposes only. The constitutional limit of poll tax, it has been held, does not prevent the requirement of males to work on the roads with a right of commutation amounting to not more than fifty cents per diem for the number of days' works required.

For an extended list of business taxes, licenses, and fees, see Code, Secs. 922-984.

Mortgages are taxed as personal property.

Exempted property is as stated in the Constitution.

WILD LANDS.—Owners of wild and unimproved lands are required to make return to the Comptroller-General, or to the tax receiver of the county where the lands lie. If the tax on such lands is not paid, the Comptroller-General, after giving 60 days' notice by newspaper publication, is required to issue execution for such taxes under which the Sheriff of the county where the land lies is required

to sell the same; in other cases the tax sale must be advertised 30 days; and in all cases whether for State or county taxes, or municipal taxes, or local public improvements, one year is allowed the owner to redeem the land sold by paying the purchaser the purchase money and 10 per cent premium and costs.

COLLECTION.—The collection of taxes, with the exception of certain corporate taxes which are paid to the Comptroller-General, is made by the County Tax Collector. Returns are made after the first day of April of each year, and taxes are due on the 20th day of April of each succeeding year. Delinquent taxes, all of which bear interest at 7 per cent, may be collected by execution. Those who fail to make a list to the assessor, are penalized by double taxation, and defaulting corporations are subject to heavy fines.

IDAHO

Art. VII, Sec. 2. The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her or its property, except as in this article otherwise provided. (License taxes and poll taxes are specifically authorized.) The legislature may exempt from taxation a limited amount of improvements upon lands.

Sec. 5. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all the property, real and personal; Provided, that the legislature may allow such exemption from the tax from time to time as shall seem necessary and just; Provided, further, that duplicate taxation of property for the same purpose for the same year is hereby prohibited.

Sec. 8. The power to tax corporations or corporate property, both real and personal, shall never be relinquished or suspended, and all corporations in this State, or doing business therein, shall be subject to taxation on real and personal property owned or used by them, and not by the Constitution exempted from taxation, within the territorial limits of the authority levying the tax.

ADMINISTRATION.—The Tax Commission created in 1913, having been abolished in 1916, the State Board of Equalization consisting of the Governor and other State officials equalize the value of property as between the counties and assesses the public service corporations. The County Board of Equalization equalizes between individuals. There is no State rate of taxation, as the law requires the amount to be assessed by *ad valorem* taxes for State purpose to be apportioned to counties by the State Board of Equalization on the basis of assessed valuation.

RAILROADS.—Railroad properties are assessed by the State Board of Equalization, this assessment covering all property necessary for the operation of the railroad and the assessment so made is apportioned among the counties on the basis of mileage. Other property is assessed by the local assessors. The general property tax is supplemented by State license upon the authorized amount of capital stock varying from $10.00 to $250.00, according to the amount of stock.

PUBLIC UTILITIES.—Express companies, telegraph and telephone companies and other public service corporations are assessed in the same manner by the State Board, and the general property tax being supplemented by State license taxes, in the case of express companies by tax upon gross receipts, and in case of telegraph and telephone companies by a tax on the capital stock.

INSURANCE COMPANIES.—Insurance companies, except mutual companies, pay a tax of 2% upon their gross premiums received in the State.

ASSESSMENTS.—Property is listed for taxation at its full cash value. Improvements are assessed separately from the land. Lands are classified as timber, agricultural, cut over and burnt, grazing, waste land and town and city lots. In the assessment of credits reduction or cancellation may be made by debts due residents of the State.

IRRIGATION.—Irrigation districts may be formed under the statute and the land therein taxed for the purpose of supporting irrigation works. This tax is due in November and becomes delinquent first Monday in January, and a lien on the property on the first Monday in March.

POLL TAX.—A county poll tax of $2.00 annually is levied on males over 21 and under 50. Each city and village has authority to require every able-bodied male to work two days on streets and highways. The delinquent forfeits the sum of $1.00 a day. A road poll tax not exceeding $4.00 on each adult person may be levied by county commissioners.

BANK SHARES.—Bank shares in State and national banks, in building and loan associations, trust and fidelity companies organized under the laws of the State, are assessed to the owners but are paid by the institutions. Foreign banks and private bankers with no fixed capital are assessed where located on an amount equal to the general average of money used during the preceding year.

INHERITANCE TAX.—The inheritance tax is paid for the benefit of the general fund of the State, and applies to all property of deceased residents and all property in the State of deceased non-residents, and also to transfers of property made in contemplation of death. Shares of stock of a non-resident decedent in an Idaho corporation are subject to the tax.

Transfers to institutions exempt from taxation or devoted to charitable, benevolent or educational purposes are exempt; $10,000 is exempt in case of widow or minor child; $4,000 in case of transfer to husband or wife, ancestors, descendants, the rates varying according to amount from 1% to 3%, and in case of other relatives and to strangers from 1½% to 15%, according to amount. The tax is paid within six months after the death of the donor; 5% discount is allowed, and if not paid within one year interest at the rate of 6% is added.

EXEMPTIONS.—Exemptions include in addition to public property all schools, churches, hospitals, cemeteries, buildings owned by Masons, Odd Fellows and other benevolent and charitable societies; property of resident widows and orphans and union soldiers and sailors to the amount of $1,000 when total assessment does not exceed $5,000; growing crops, public and private libraries, tools and farming implements and machinery to the amount of $400.00; possessory right to public lands, mortgages, mining claims not patented; irrigation canals and ditches when used by the owner on his land; improvements on lands not exceeding $200.00.

COLLECTION OF TAXES.—The Board of County Commissioners at its annual meeting may order cancellation of any manifestly erroneous tax bills and the refunding of any money erroneously collected.

Real and personal property is assessed between the second Monday in January and the fourth Monday in June. Refusal to make a statement deprives the taxpayer of all rights before the Board of Equalization. In assessing solvent credits, debts due *bona fide* residents of the State may be deducted.

Taxes become delinquent on the first Monday in January following the levy, 10% penalty being added. If one-half of the taxes have been paid prior to the time the whole became delinquent, then 4% penalty is added. All taxes become a lien on the property on the second Monday in January, and are due ten days after the second Monday in September. The County Treasurer is collector of personal property taxes.

ILLINOIS

Constitution, Art. IX, Sec. 1. The General Assembly shall provide such revenue as may be needful by levying a tax on valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly may direct, and not otherwise (specially authorizing the levying of license taxes "by general law uniform as to the class upon which it operates").

Sec. 2. (The specification of certain objects for taxation not to deprive the General Assembly of the power to require other subjects and objects of taxation consistent with the principles of taxation fixed in the Constitution.)

Sec. 3. The property, cities, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation by general laws. (This language construed as limitation upon legislative power to exempt other property either by general or special law.) Coal Co. v. Mitler, 236 Ill. 149 (1908).

In the assessment of real estate incumbered by a public easement, any depreciation occasioned by such easement may be deducted from the valuation of such property.

Sec. 4. No sale of property for taxes or assessment without a return of such unpaid taxes or assessments to some general officer having authority to receive the same, and only by an officer upon the order or judgment of some court of record.

Sec. 5. (No power in general assembly to release or discharge any county, city, township or district, or the inhabitants or the property therein of its proportionate share of taxes, nor shall any commutation of taxes be allowed.)

Sec. 7. All taxes levied for State purposes shall be paid into the State treasury.

Sec. 8. (Counties not to assess taxes to aggregate exceeding 75c upon the $100 valuation, except for payment of indebtedness existing at the time of the adoption of the Constitution, unless authorized by a vote of the people of the county.)

Sec. 9. (Express authorization given to general assembly to authorize the local authorities to make local improvements by special assessments and to assess and collect taxes for other corporate purposes, to be uniform with respect to property within the jurisdiction of the body imposing the same.) (Prior to the adoption of this Constitution in 1870, assessment on the frontage rule had been held unconstitutional, Chicago v. Larned, 34 Ill. 203. But under the present constitution, such assessments are enforced.)

Sec. 10. The General Assembly shall not impose taxes upon municipal corporations or the inhabitants or property therein for corporate

purposes, but shall require that all taxation of property within the limits of the corporation shall be taxed for the payment of debts contracted under the authority of law, such tax to be uniform with respect to persons and property within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken and sold for the payment of municipal debts of municipal corporations.

Art. XIV. (The sections deal with the settlement of the State's claim on the Illinois Central Railroad under the provisions of its charter of February 10, 1851.)

Amendment to Constitution reported as adopted in 1916, Art. IX, Sec. 14:

"From and after the date when this section shall be in force, the powers of the General Assembly over the subject-matter of the assessment of personal property shall be as complete and unrestricted as it would be as if sections one (1), three (3), nine (9), and ten (10), of this article of the Constitution did not exist; provided, however, that any tax levied upon personal property must be uniform as to persons or property of the same class within the jurisdiction of the body imposing the same, and all exemptions from taxation shall be by general law, and shall be revocable by the General Assembly at any time."

ADMINISTRATION.—The State Board of Equalization, one elected from each of the twenty-five Congressional districts of the State with the State Auditor, not only equalizes between the several counties, but also assesses the operating property of the railroads and public utilities, the local property being assessed by the local assessors. There is an exception in the case of the Illinois Central Railroad, which, under its original charter pays 7 per cent of its gross earnings. In its equalization between the counties the Board is subject to the restriction that the total of such increase or decrease in any county may not exceed 10 per cent of the assessed value of all the property in the State.

(For construction of the powers of the Board, see Chicago Union Traction Co. v. State Board of Equalization, 114 Fed. 557, 207 U. S. 20, *supra*, Sec. 546.)

In the counties not under the township organization, equalization between the taxpayers of counties and districts is made by the Board of County Commissioners; while in counties under the township organization, other than Cook County, the same powers vest in the Board of Review; and in Cook County, including Chicago, there is a specially constituted Board of Review. The County Treasurer supervises the local assessors.

The Governor, Treasurer and Auditor on the equalization and assessment of property ascertain the rate of tax necessary to meet the amount of taxes levied by the General Assembly.

RAILROADS.—Railroads, except the Illinois Central Railroad, are assessed by the State Board of Equalization and the local assessors, the latter assessing all real estate not included in the right of way of railroad track and all personalty except rolling stock. The State Board assesses the railroad track, the right of way and the rolling stock, apportioning the value by unit rule among the counties where it is reapportioned by the County Clerk among the townships, etc.; but the "side track" is assessed where it is located by the State Board and is not so apportioned. (See People v. Illinois Northern R. R. Co., 248 Ill. 539 (1911.)

The State Board also assesses the excess value of capital stock over the value of the tangible property, if there be any such excess.

PUBLIC UTILITIES.—Telegraph and telephone companies are assessed in the same manner as railroads.

CORPORATIONS.—All corporations, including public utility corporations, are subject to the General Property Tax, and business corporations make returns in the same manner as individuals. The value of capital stock, if any, over corporate property, is assessed by local assessors. People v. Federal Securities Co., 255 Ill. 561.

Shares of stock of foreign corporations are assessed to shareholders, if residents.

BANKS.—Shares in State and national banks are assessed to the shareholder where the bank is located, less deductions for real estate.

INSURANCE COMPANIES.—The property and assets of life insurance companies organized under the laws of the State, are assessed to a corporation as to an individual person; and in computing the taxable property, the value of the real property taxed is deducted from its net admitted assets above liabilities and returned to the insurance commissioner.

FOREIGN CORPORATIONS.—Foreign corporations doing business in the State pay the State one hundred dollars for the privilege, and are subject to the general property tax upon their property.

INHERITANCE TAX.—The inheritance tax is at the rate of one per cent when the person is a parent, or husband, or wife, brother or sister, wife, widow and the son or husband of a daughter, adopted

child or any legitimate lineal descendant, when the amount is $20,000.00 and over up to $100,000.00. The property passing to religious, educational or charitable purposes is exempt. In other cases, the rate of tax is according to the relationship and amount of the inheritance. The law applies to all property thus passing by will of testator's where the deceased is a resident; and if a non-resident, to property situated within the State at the time of death. Shares of stock in an Illinois corporation at the time of death are subject to the tax. This law was sustained by the Supreme Court of U. S. (*Supra*, Sec. 516.) For construction of the Act see Stein v. Meyers, 253 Ill. 199.

There is also a list of business taxes, licenses and fees for different occupations, whether corporations or individuals, levied by the State, counties and municipalities. The cities and villages and incorporated towns are given authority to license all business and occupations, including liquor licenses.

POLL TAX.—While there is no State or county poll tax, counties under the township organization may levy a poll tax of not less than one dollar nor more than five dollars for road purposes; and such tax may be paid by the labor system.

EXEMPTIONS.—Exemptions include all public property and also all investments of local and purely public charity, and all church property actually and exclusively used for church purposes (as to construction excluding passages, see First Congregational Church v. Board of Review, 254 Ill. 220), cemeteries and for public libraries, and all property used for agricultural, horticultural, mechanical and philanthropic purposes, when not used for public profit, and all market houses and the property of drainage districts.

ASSESSMENTS.—County and city taxes are paid upon the same assessment made for State taxes.

From the gross amount of credit the taxpayer may deduct from his list the amount of all *bona fide* debts owing by him, these deductions being verified by oath.

Property is assessed as of the first day of April; real estate is assessed once every four years; personal property is assessed annually. The assessed value of both real and personal property fixed by the assessor is one-third of the full value required to be returned by the taxpayer.

COLLECTIONS.—All taxes, State, county and municipal, are paid to the same collectors, the Sheriff being ex-officio collectors in most of the

counties. Personal property taxes are collected by distress and sale of goods and chattels. The collector receives the return on or before January first following the year in which the taxes are levied. Taxes on real estate become delinquent March 10th of the year following the assessment, and the land may be sold for taxes by publication of the proper notice and obtaining judgment and order of sale at the June term of the County Court. Taxes become a lien upon real property upon May 1st of the year in which the taxes are levied, and interest is charged from that time.

INDIANA

Art 10, Sec. 1. The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes as may be specifically exempted by law.

ADMINISTRATION.—A State Board of Tax Commisioners, three of the members appointed by the Governor (not more than two of same political party), with the Secretary of State and the Auditor of State, *ex officio* members, has general supervision of the tax administration in the State and of equalization of county assessments, hearing appeals from the County Boards of Review. The board also makes original assessment of the operating property of railroads, telegraph, telephone and express and pipe line companies, the value whereof in the State being determined by an apportionment of the total mileage and the State valuation thus ascertained is apportioned to the counties, where the State mileage is located.

A special Tax Commission for investigation and report was created in 1915. (See report.)

The general property tax in general terms is applicable to all property of the State, individual and corporate not specially exempted.

The County Assessor in each county is responsible to the State Tax Commissioner, and exercises supervisory authority over the township assessors with power to make assessments where the County Assessors fail to do so.

RAILROADS AND PUBLIC UTILITIES.—Railroad property, including street railroad property, that is, railroad tracks and improvements thereon and rolling stock, and telegraph, telephone, express companies, sleeping car companies, car companies, oil and gas pipe line companies are assessed by the State Board of Tax Commissioners on the basis of

the market value of the stocks and bonds less the value of real estate and tangible personalty taxed locally and the assessment so made is apportioned on a mileage basis to the assessment districts in which the property is located. (The taxation of interstate railroads sustained by Supreme Court, Sec. 263 *et seq., supra.*)

Corporations are assessed as individuals on all corporate property, including corporate stock and franchises, corporate taxation being thus a part of the general property tax system of the State. The capital stock is listed for taxation at its excess value over franchises and tangible property.

BANKS.—State and national banks, except savings banks, are assessed upon their real estate, and such assessment is deducted from assessment of shares.

INSURANCE COMPANIES.—Foreign insurance companies pay a tax of $3.00 on each $100.00 excess of premiums received over losses. Foreign bridge companies are taxed on their gross earnings as well as on property. Also a special tax of 3 cents per ton on registered tonnage on navigation companies. Freight associations pay the State a sum in the nature of an excise tax equal to 1 per cent of the amount fixed by the Tax Commission after deducting the value of real estate.

POLL TAXES.—A poll tax is assessed on every male inhabitant of the State between the age of 21 and 50 years, members of the militia being exempted. The amount to be charged on each poll is fixed by the General Assembly for State purposes and for schools.

INHERITANCE TAX.—An inheritance tax was imposed, by Laws of 1913, upon intangible or tangible property within the State, passing from any person dying, seized or possessed thereof while a resident of the State, and also upon tangible property within the State where the decedent owner was a non-resident of the State at the time of his death.

The exemptions from this tax include all property transferred to any public or religious, charitable or educational purpose within the State. The rates vary with the degree of relationship and the amount of the legacy from $1.00 where the devise is to husband, wife, lineal issue, lineal ancestor of decedent, 1½ per cent in the case of brother or sister, 3 per cent in the case of brother or sister of a father or mother of descendant thereof, 4 per cent in the case of a brother or sister of the grandfather or grandmother, and 5 per cent in the case of a stranger in blood. There is an exemption of $10,000 when the

transfer is to the widow, and $2000 to each of the other persons in the first class. The tax is payable to the Treasurer of the county and the Circuit Court or the court having probate jurisdiction determines the amount and has jurisdiction of the inheritance tax. For details see Burns Annotated Statute, Secs. 10143, Act of 1915.

The owner of real estate may have mortgage debt thereon on March 1st, not exceeding $700.00, and not greater than one-half of assessed value, deducted from assessed valuation of mortgaged premises. (See Smith v. Indiana, 158 Ind. 543, *supra.*)

ASSESSMENTS.—The assessment of real estate is made quadrennially, and the personal assessment is made annually as of March 1st.

EXEMPTIONS.—Exemptions include public property and that held for charitable, educational and religious uses, bonds of the State and municipalities of the State including local improvement bonds, also the property of Greek letter fraternities, of schools and colleges. Also registered bloodhounds for detecting crime or apprehending criminals.

COLLECTIONS.—Taxes attach as a lien on March 1, and penalties attach on first Monday in May. Unpaid taxes are collectible thereafter by distress and sale of personalty. Sales of real estate for taxes, are second Monday in February, and the owner has two years thereafter in which to redeem, and if not redeemed, deed is made to purchaser by county auditor.

IOWA

Art. I, Sec. 6. The General Assembly shall not grant to any citizen, or class of citizens, privilges or immunities, which, upon the same terms, shall not equally belong to all citizens.

Art. III, Sec. 30. The General Assembly shall not pass local or special laws for the assessment and collection of taxes for State, county or road purposes.

Art. VII, Sec. 7. Every law which imposes, continues or revises a tax shall distinctly state the tax and object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.

Art. VIII, Sec. 2. The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals.

ADMINISTRATION.—The State executive council composed of the Governor, Secretary, Auditor and Treasurer of the State constitutes the State Board of Review and acts as a State Board of Equalization and also as an assessment board for certain classes of property.

The local assessing officers are city and township assessors, township trustees and city counsellors which act as boards of review and as county boards of supervisors which act as county boards of review and equalization.

RAILROADS AND PUBLIC UTILITIES.—The State Board of Review assesses public utilities including railroads, and in assessing such property, takes into consideration the gross earnings apportioned to the State, proceeding generally upon the unit rule.

CORPORATIONS.—Corporations are assessed by local assessors on their property, the shares of stock being exempt. The excess of the value of the capital stock of the corporation, however, over and above its tangible property is assessed and taxable to the company. There are no special corporation taxes except on insurance companies. Foreign corporations pay taxes upon their property as domestic.

BANKS.—Shares in banks are assessed to holders at office of bank, less value of real estate.

MERCHANTS AND MANUFACTURERS.—Merchants and manufacturers are assessed upon the average amount of stock held during the year.

Grain, ice and coal dealers are assessed on the average amount of capital used during the year.

ASSESSMENT.—All property is subject to taxation at a value defined to be the value in the market in the ordinary course of trade. After it is assessed on such basis, it is then assessed at 25 per cent of such actual value except that credits, monies, corporation shares, stocks, cash, bank notes, notes secured by mortgage, accounts, contracts for cash, bills of exchange, judgments, choses in action, etc., are assessed at their actual cash value and taxed on a uniform basis of five mills on the dollar.

TAX RATE.—The General Assembly fixes the total amount of money to be raised for State purposes. The Executive Council determines the rate of per cent on the valuation of the taxable property necessary to raise the amount fixed by the General Assembly. The rate so determined is levied by the County Boards of Supervisors. By Act of 1917, in all taxing districts of the State wherever the people are authorized to determine by vote, or the officers are authorized to estimate or determine a rate of taxation required for any public purpose, such rate shall in all cases be estimated and based upon the adjustable and taxable valuation of such district for the preceding calendar year.

INHERITANCE TAX.—The graduated inheritance tax is in force, the amount to be paid depending upon amount received from a decedent and the degree of relationship of the inheritor to the decedent. The tax is paid to the State Treasurer by the executors and administrators, and is a lien upon the estate. No discount is allowed for prompt payment; but unless paid within eighteen months, interest at the rate of 8 per cent is added from the date of the death of the decedent.

This tax applies to the estates of all deceased persons, whether inhabitants of the State or not, and whether the property be real or personal, tangible or intangible, when the property is at the time of death, or thereafter becomes, subject to the jurisdiction of the courts of the State for purposes of distribution, or the property of any decedent domiciled within the State at the time of the death of such decedent, even though the property of such decedent so domiciled was situated without the State, except real estate located outside of the State passing in fee to the decedent owner. A tax of 5 per cent in case of residents is made 20 per cent when the heirs and beneficiaries are non-residents; except when they are brothers or sisters, the charge is 10 per cent.

INSURANCE COMPANIES.—Insurance companies other than fraternal, beneficial and county mutual companies are taxed upon their annual gross receipts. Many occupations pay a license tax.

The Board of Supervisors have power to remit the taxes, in whole or in part, on property destroyed by fire if such properties are not covered by insurance.

POLL TAX.—There is a county poll tax of fifty cents on each male resident. Cities and towns have the power to provide that able-bodied male residents shall work two days on the highways, or, in default of such work, may be penalized not to exceed two or four dollars.

COLLECTION.—Taxes are payable between the first Monday in January and the first day of March, or one-half may be paid before March, and the remaining half before the first day of September. If at least one-half is not paid before the first day of April, the whole amount becomes delinquent as of March 1st. In case the second installment is not paid before the first of October, then it becomes delinquent on the first day of September. After a tax becomes delinquent, it draws 1 per cent a month. All taxes are a lien on property and may be collected by sale.

Land sold for taxes may be redeemed within three years upon the payment of the purchase price, plus accrued taxes and interest added as penalty.

KANSAS

Art. XI, Sec. 1. "The legislature shall provide for a uniform and equal rate of assessment for taxation; but all property used exclusively for State, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least $200.00 for each family shall be exempt from taxation."

"Sec. 2. The legislature shall provide for taxing the notes and bills, discounted or purchased, moneys, loans, or other properties, effects, or dues of every description (without deduction) of all banks now existing or hereafter to be created, and all bankers, so that all property employed in banking shall always bear the burden of taxation equal to that imposed upon property of individuals."

Sec. 3. (The proceeds of government land grants and of escheats to be a perpetual school fund.)

Sec. 7. (Provides for taxation to support the State University.)

ADMINISTRATION.—The State Tax Commission, composed of three commissioners appointed by the Governor for a term of four years, also constitutes a State Board of Equalization. It assesses the railroads, and the valuations fixed by the State Board must be used as the basis for local taxes. It has general supervision over the assessment and collection of taxes and acts as a Board of Assessors for railroad property.

The County Board of Equalization equalizes the assessments of real property in each county, and an appeal lies therefrom to the State Board of Equalization. The State Tax Commission determines the rate of taxation for State purposes.

RAILROADS.—Railroads pay the general property tax locally for both State and local taxation. Assessment of the property (other than local real estate) is made by the State Tax Commission. The real estate not used in daily operation is assessed locally.

In the assessment by the Board, the intangible value is included in the average value fixed, and apportioned to the counties.

Public utilities (other than express companies), see *supra*, are assessed in same manner.

CORPORATE TAXATION.—Domestic corporations pay a graduated annual tax ranging from $10.00 where the capital is $10,000.00 or less, to $2,500.00 on one whose paid-up capital stock exceeds $5,000.00. This

tax is supplemental to the general property tax. Foreign corporations authorized to do business in the State, pay the same tax based upon the proportion of the issued capital stock of the company devoted to its Kansas business, this proportion being determined by the amount of its property located and used in the State. For decisions of Supreme Court of United States concerning this tax, see *supra*, Secs. 199, 254. Failure to file the annual report and pay the fee may subject the corporation to a forfeiture of its charter or of authority to do business in the State.

Holders of shares in domestic and foreign companies, are exempt, when the capital stock is listed by the corporation for taxation in the State. Holders of bonds in both domestic and foreign companies are taxed (in theory) upon such property.

BANKS.—The stock in banking institutions is taxed to the holders. From the valuation of stock and surplus is deducted the value of corporate property, not only in the State, but located out of the State, if there taxed.

POLL TAXES.—There is no State poll tax, but in townships there is a poll tax on males between the ages of twenty-one and fifty for the benefit of the public roads, commuted by labor in lieu of a tax. There is no county poll tax.

COUNTY LICENSES.—The counties do not receive any revenue from business companies, licenses or fees, but in cities, the city council may levy on adult males of not more than $1.50, and may also classify lawful corporations and levy a license tax thereon. See 151 S. W. Rep. 932, holding a license tax of $300 when the profits of the business was only $500, was unreasonable and oppressive.

COLLECTION.—The general property is assessed as of September 1st for the following year and taxes are due on March 1st. There is provision for retrospective assessments of omitted property. Taxes not paid by December 1st pay 6 per cent additional. The Sheriff may levy on personal property and may levy on and sell real estate; and if there is no other purchaser the State may purchase subject to right of redemption within two years, by paying the purchase money with interest at 10 per cent and 15 per cent damages and costs. Persons of unsound mind and married women have five years after notice of sale to redeem, when sale is made to a purchaser other than the State.

ASSESSMENT.—There is but one assessment for State, county, and municipal purposes; and the property included and exempt, and

the method of assessment and equalization are the same for the county as for the State, and it is also the same for municipalities.

By Act of 1917, oil and gas leases, wells and equipment are assessed as personal property.

EXEMPTIONS.—The constitutional provisions as to exemptions was held not to be exclusive, but the legislature can provide other exemptions or increase the personal property exemptions of each family so long as the exempt property benefits the public in a way different from other property. (See Wheeler v. Wightman, 96 Kan. 50.)

The established exemptions include, in addition to all public property, churches and school houses, moneys and credits of universities, colleges, academies, public libraries, family libraries, and school books up to fifty dollars; Grand Army Post buildings; reserve and emergency funds of fraternal beneficiary societies; building and one-half acre of land used exclusively by college societies as library halls or dormitories.

State, county, city, school, district and municipal bonds of the State of Kansas need not be listed for taxation. Debts to specified extent may be deducted from credits in returns.

MORTGAGE TAXATION.—The mortgage registration tax of 1915 was adjudged invalid, as it was held to be a property tax, and there was no power of classification contained in the Constitution. (See Wheeler v. Wightman, *supra.*)

INHERITANCE TAX.—The Inheritance Tax of 1915 exempts the husband and wife, lineal ancestors or descendants, adopted child or descendants of an adopted child, or widow of a son, or husband of a deceased daughter are exempt, and also bequests to charitable, educational and religious institutions. Shares of brothers or sisters of deceased are exempted up to $5000.00; and all other distributees are taxed on the full value of their shares at a rate varying according to amount. Taxes are assessed on the distributees of all property located in the State, whether owned by the inhabitants or not.

A tax is assessed on the distributees of all property located within the State, whether owned by inhabitants thereof or not, and is also imposed on non-residents, owning stocks in Kansas corporations. The tax applies to all property within the jurisdiction of the State, whether belonging to the inhabitants of the State or not, passing by will or intestacy. The Tax Commission determines the amount of tax due upon any estate, and certifies the amount to the Probate Court; and the tax is paid to the State Treasurer.

By Act of 1917, the Inheritance Tax Law was amended as to administration of the act.

EXPRESS COMPANIES.—Express companies pay an excise tax of 4 per cent of their gross receipts, assessed by State Tax Commission, for business done within the State in addition to the taxes on tangible property.

INSURANCE COMPANIES.—Insurance companies organized under the laws of another State pay 2 per cent on gross premiums collected, while those organized under the laws of a foreign State pay 4 per cent on the gross premiums collected in the State; and all insurance companies, domestic or foreign, doing business in the State, pay an annual tax of fifty dollars to the State Treasurer for the State school fund.

MERCHANTS AND MANUFACTURERS.—By Act of 1917, the *situs* for taxing the property of merchants and manufacturers is the county where such business of manufacturing is carried on; and if there is more than one place of business in the State, each place shall be taxed. Merchants and manufacturers who are non-residents or foreign corporations are assessed on the same basis as residents of the same State or domestic corporations.

COLLECTIONS.—Taxes for State purposes, as well as township and county taxes are collected by the county treasurer. Taxes become a lien on property on November 1st of each year. They may be paid in installments, one-half on or before December 20th, and one-half on or before June 20th; but if the first installment is not paid when due, the whole tax becomes delinquent and may be collected at once, together with a penalty of 5 per cent on the first installment. All taxes delinquent after June 20th involve an additional penalty of 5 per cent. The taxpayer pays both installments in December, but received a rebate of 5 per cent on the second installment.

Delinquent personal taxes are collected by the Sheriff by seizure and sale of property.

By Act of 1917, the Tax Commission is authorized to correct errors in the assessment, and also to direct the refunding of taxes shown to have been unlawfully collected. Valuations, however, are not considered in that connection as erroneous assessments.

KENTUCKY

(Constitution as amended in 1915.)

Sec. 170. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship,

with the grounds attached thereto and used and appurtenant to houses of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding $250 in value; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location.

Sec. 172. All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law.

Sec. 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation as is paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.

Sec. 175. The power to tax property shall not be surrendered or suspended by any contract or grant to which the commonwealth shall be a party.

Sec. 180. The General Assembly may authorize the counties, cities or towns to levy a poll tax not exceeding $1.50 per head. . . .

Sec. 181. The General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations, and professions. And the General Assembly may, by general

laws only, authorize cities or towns of any class to provide for taxation for municipal purposes on personal property, tangible and intangible, based on income, licenses or franchises, in lieu of an *ad valorem* tax thereon: *Provided,* Cities of the first class shall not be authorized to omit the imposition of an *ad valorem* tax on such property of any steam railroad, street railway, ferry, bridge, gas, water, heating, telephone, telegraph, electric light, or electric power company.

Sec. 182. Nothing in this Constitution shall be construed to prevent the General Assembly from providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And, until otherwise provided, the present law on said subject shall remain in force.

"The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only, and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"The General Assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the State and of counties, municipalities, taxing and school districts shall not be subject to taxation."

(The amendment contains the further provision that any law enacted by the General Assembly in the classification of property, and providing a lower rate on personal property, tangible or intangible, and upon real estate, should be subject to the referendum power of the people, which was declared to apply only to this amended section. This referendum may be demanded against any one or more items of any such act, and the veto power of the Governor's does not apply thereto.)

TAX COMMISSIONS.—A State Tax Commission, consisting of three members, the Auditor of the State together with two members appointed by the Governor with the consent of the Senate, one from each of the two dominant political parties, was established in 1917, and is charged with the general supervision of the tax system and with the assessment of public utilities.

CLASSIFICATION LEGISLATION.—The legislation enacted in 1917, under this classification amendment, and which is to be submitted to a referendum vote of the people, may be summarized as follows:

Bonds of the United States, State of Kentucky, counties, and municipalities thereof, are exempt from all taxation.

Real estate comprising land and improvements, is taxable for both

State and local purposes at forty cents on each $100.00 valuation for the State, and local rates for localities.

Stocks of corporations having more than 25 per cent of their taxable assets in Kentucky, are exempt from all taxation. Bonds and stocks other than above, mortgages, notes, accounts, cash in hand, agricultural and manufacturing machinery, raw material, products in course of manufacture are subject to State taxes only at the rate of 40 cents on each $100 valuation. Mortgages running over five years, subject to an additional registration fee, when recorded, of 20 cents on each $100. Bank deposits of individuals, subject to taxation for State purposes only of 10 cents for each $100, may be paid by the bank.

Live stock is subject to State tax of 10 cents on each $100 valuation, and local tax at the rate fixed by local taxing authorities.

Tangible personal property other than above, such as merchandise, building material, vehicles, steamboats, liquors not in government warehouses, household appurtenances, etc., will be taxable for both State and local purposes at 40 cents on each $100 valuation in the State, and at local rates for localities.

Public utility corporations pay taxes as individuals on the classes of property owned and on their franchises, which are valued for assessment by the State Tax Commission. Franchises are taxable for both State and local purposes 40 cents for each $100 valuation for the State, and at local rates for localities.

Private corporations are taxed on their properties as individuals, there being an annual occupation tax of 50 cents on each $100 of authorized capital.

Banks and trust companies are taxable for both State and local purposes on the valuation of their shares by the State Tax Commission, and on their real estate and tangible property by local assessors, the taxes whereon are deducted from the total valuation of their shares.

(See Reports of Special Tax Commission to the Legislature of Kentucky, 1913; also Report of the Committee on Tax Reform of Louisville Commercial Organization, 1915; also Bulletin of National Tax Association, Vol. 2, p. 263; also Report of U. S. Commissioner of Corporations, Part VI, March 15, 1915, pp. 154 to 183.)

RAILROADS, ETC.—Railroads, express companies, telegraph and telephone companies are assessed by the State Board upon the value of their franchise, which value is determined by subtracting from the value of the capital stock the value of all tangible property otherwise

assessed. The tangible property is assessed by local officers subject to the general property tax. Domestic companies doing business entirely without the State pay a State license tax of 1 per cent upon the authorized amount of capital stock in lieu of all other taxes within the State. The shares of foreign companies not owning property within the State are taxed to the holders.

INHERITANCE TAX.—In 1916 the former collateral inheritance tax was made a tax both upon direct and collateral inheritances, the primary rate varying from 1 per cent on property passing to the husband and wife, lineal ancestors or descendants, or adopted child, to 5 per cent in case of collateral heirs, strangers and bodies politic or corporate. Property bequeathed to municipal corporations for public purposes is exempt; and in case of widows and each minor child the exemption is $10,000; for other classes of heirs the exemption is $500; on estates in excess of $25,000 the rate progresses from 1½ to three times the primary rate to the excess over $25,000. All corporations, domestic and foreign, pay an annual license tax of 30 cents on each $1000 which is assessed on the basis of property owned and business done in the State.

The tax applies to all property passing by will or intestacy either of any person who died while a resident of the State; or if the deceased was a non-resident, it also applies to any property within the State.

POLL TAXES.—The State does not share in the poll taxes which are levied by the counties both in a money levy not to exceed $1.50 to be applied for the maintenance of public roads and bridges and also of work on the road.

The exemptions are set forth in the Constitution, Sec. 170.

Counties and cities do not share in the inheritance tax or special corporation tax.

COLLECTIONS.—Taxes are due on March 1st, assessment having been made as of September 1st of the preceding year. The sheriff is tax collector of State and county taxes, municipalities selecting their own tax collector. Taxes are a lien on real estate from date of assessment. A penalty of 6 per cent is imposed for failure to pay taxes by December 1st. The sheriff may levy on personal property; and if there be no personal property, he may levy on real estate, and the State may purchase if there is no other purchaser. Redemption may be made within two years by paying purchase money with interest at

the rate of 10 per cent with 15 per cent damages and costs. Those under disabilities have one year after removal of disability. Special provision is made in case of guardian and married women, after notice of sale, to redeem.

LOUISIANA

Constitution of 1898. Art. 224. The taxing power may be exercised by the General Assembly for State purposes, and by parishes and municipal corporations and public boards, under authority granted to them by the General Assembly, for parish, municipal and local purposes, strictly public in their nature.

Art. 225. Taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, and all property shall be taxed in proportion to its value, to be ascertained as directed by law; provided the assessment of all property shall never exceed the actual cash value thereof; and provided, further, that the taxpayers shall have the right of testing the correctness of their assessments before the courts of justice. In order to arrive at this equality and uniformity, the General Assembly shall, at its first session after the adoption of this Constitution, provide a system of equality and uniformity in assessments based upon the relative value of property in different portions of the State. The valuation put upon property for the purposes of State taxation shall be taken as the proper valuation for purposes of local taxation, in every subdivision in this State.

Art. 227. The taxing power may be used to provide pensions for indigent Confederate soldiers and sailors, and their widows, to establish markers or monuments upon the battlefields of the country, commemorative of the services of Louisiana soldiers on such fields, and to maintain a memorial hall in New Orleans, to collect memorials of the late Civil War.

Art. 228. The power to tax corporations and corporate property shall never be surrendered nor suspended by act of the General Assembly.

(Article 230 as amended in 1902, 1904, 1908, 1910 and 1912.)

("It is provided that the subjects specified, and none other, shall be exempt, to-wit, public property, churches, parsonages, household property of the value of $500.00, mortgages upon real estate in the State, and loans by life insurance companies to their policy holders, provided the rate of interest does not exceed 5 per cent per annum, the legal reserve of all life insurance companies organized in the State, the capital and surplus of corporations loaning money on country real estate, also steamship companies for the term of fifteen years, and railroads constructed subsequently to January 1, 1905 and prior to January 1, 1909.")

Art. 231. (Gives special authority to levy a poll tax for maintenance of public schools in parish where located.)

Art. 232. (Fixes rate of taxation.)

Amendment adopted November, 1914:

(a) Requiring foreign banking corporations to pay to the State a yearly license tax of $250.00 and 2½ per cent on gross interest earned on all money loaned and a like tax to the municipality or parish.

(b) Exempting from taxation all money in hand or on deposit.

(c) Exempting from taxation for ten years from date of completion the capital stock, franchises and property of all corporations constructing, owning, and operating within the State a combined system of irrigation, navigation, and hydroelectric power, provided that not less than $3,000,000 shall have been expended in the construction.

Art. 233. There shall be no forfeiture of property for non-payment of taxes, but there must be sale, with the privilege to the taxpayer of redeeming within one year. All deeds of sale made by the collectors shall be received as *prima facie* evidence of a valid sale.

Art. 234. The tax shall be designated by the year in which it is collectible, and the tax on movable property shall be collected in the year in which the assessment is made.

Art. 235. An inheritance tax may be levied by the legislature solely for support of the public schools on all inheritances greater than $10,000.

Art. 237. The legislature shall pass no law postponing the payment of taxes, except in case of overflow, general conflagration, general destruction of crops, or other public calamity.

Art. 242. Foreign corporations doing business in Louisiana may be licensed or taxed by a mode different from that provided for home companies, provided that this different mode shall be uniform, upon a graduated system, and shall be equal and uniform as to all corporations doing the same kind of business.

Amendment adopted Nov. 7, 1916:

Art. 225. Taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, and property shall be taxed in a manner directed by law; provided, that the valuation of property for the assessment of State taxes, levied by the General Assembly and by this Constitution, may be different from the valuation fixed for all other purposes; provided, further, the assessment of all property shall never exceed the actual cash value thereof; and provided, further, that the taxpayers shall have the right of testing the correctness of their assessments before the courts of justice.

Art. 226. There shall be and is hereby created a Board of State Affairs whose duty it shall be to assess, for State purposes, all taxable property throughout the State of Louisiana. It shall have such other authority relative to State assessment, budget, income, and expenditure as may be conferred upon it by the General Assembly. The said Board shall be composed of three members, who shall be appointed by the Governor for such terms as may be fixed by the General Assembly.

ADMINISTRATION.—The Board of State Affairs, though subject to future legislation, under the amendment of 1916, is empowered to assess for State purposes all taxable property throughout the State. For each parish, except that of Orleans, one assessor is appointed by the Governor, affirmed by the Senate, for a term of four years. All taxable property, except that assessed by the State Board, is assessed locally.

RAILROADS.—Railroads pay locally the general property tax for State and local purposes. Railroad track, real estate used for railroad purposes, and rolling stock are assessed by the Board of State Affairs. The various classes of rolling stock are valued separately. Where the road extends into another State a portion of the value of the rolling stock assignable to Louisiana is that percentage of the aggregate value of all cars which the length of track in Louisiana over which they travel bears to the total length of the track wherever traveled. The valuation of rolling stock is assigned to the parish in which the road has its principal office, and terminal property to the parish in which such property is located. (See Statutes, p. 1541, as amended, Laws of 1914.)

EXPRESS, SLEEPING CAR, ETC., COMPANIES.—Express, sleeping car, telegraph, and telephone companies pay locally the General Property Tax for State and local purposes. In addition, companies of these classes, except sleeping car companies, pay locally the license tax for both State and local purposes. All property used in the operation of these companies is assessed by the State Board. Each of these companies pays locally for State purposes license taxes based upon gross earnings, as specified in the statute. (Statute, pp. 1715, 1715.) Additional licenses for local purposes, levied by each parish through which the lines or routes extend, are sometimes equal in amount to the State license.

PUBLIC UTILITY COMPANIES.—Other public utility companies, street railway, electric light, etc., pay the General Property Tax, and also locally both State and local license taxes.

DOMESTIC BUSINESS CORPORATIONS.—Mercantile, mining and manufacturing companies pay locally for State and local purposes, the General Property Tax on all property. Mercantile companies are assessed upon their stock in trade, etc., so that the assessment will represent in the aggregate a fair average of the capital employed in

the business. Certain companies also pay locally annual license taxes, based upon gross receipts. (See Constitution, Art. 229, Statutes, pp. 1675, etc., as amended, Laws of 1914, p. 516.)

BANKS.—Banks are taxed upon the value of their capital stock less the real estate.

FOREIGN CORPORATIONS.—Foreign corporations pay the General Property Tax and also an annual license tax levied upon certain classes of foreign corporations. (See Statutes, pp. 1714, 1715.)

LICENSES.—There is an extensive system of business taxes, licenses, and fees applicable to different classes, businesses and professions.

POLL TAX.—The poll tax is paid out to the parishes for support of the public schools.

INHERITANCE TAX.—An inheritance tax distributed to the parishes for the sole use of public schools, is 2 per cent on direct inheritances to the parents, descendants and the surviving husband or wife, and 5 per cent for collateral inheritances, there being an exemption in the first case below $10,000.00. Educational, religious and charitable bequests are exempted, and there is also an exemption when the property bequeathed or donated has borne its just proportion of taxes prior to such donation.

The statute taxes all property within the jurisdiction of the State, but it has been held that the act does not include in its terms real estate of the decedent in another State. All personal property of the decedent, when a resident of the State, is taxed. Property to the value of $10,000 is exempt.

EXEMPTIONS.—Mortgages upon real estate in the State are exempt from taxation under the constitutional amendment of 1908. National, State and municipal bonds or stocks owned continuously for six months; public property, places of religious worship or burial, all charitable institutions, historical collections and monuments, and household furniture to the value of $500 are also exempt. Capital and machinery employed in mining operations are also exempt from parochial and municipal taxation for ten years from January 1, 1909, and also property employed in specified manufacturing enterprises, provided not less than five hands are employed in any one factory; and any railroad completed prior to January 1, 1909, provided the

railroad had not received public aid; and any railroad the construction of which had begun, and the roadbed of which was substantially completed at the time of the adoption of the Constitution of 1898. Property of military organizations and State national guards is also exempt.

COLLECTION.—Property holders make return to the assessor of values in the country parish before May 1st and New Orleans 20 days after lists are returned to the assessor. Parties dissatisfied with assessments can appeal to the courts. Taxes become a lien on real estate after December 31st. Officers of corporations are required to make sworn reports upon blanks furnished by assessors before January 20th of each year. Property on which the taxes are delinquent can be sold by tax collectors by advertisement, or after advertisement without intervention of court proceedings.

MAINE

Art. I, Sec. 22. No tax or duty shall be imposed without the consent of the people or of their representatives in the legislature.

Art. IX, Sec. 7. While the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years.

Sec. 8. (As amended by Amendment 36, Resolves of 1913, c. 264, adopted September 8, 1913.) All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof; but the legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property.

Sec. 9. The legislature shall never, in any manner, suspend or surrender the power of taxation.

ADMINISTRATION.—A Board of State Tax Assessors of three members, appointed by the Governor (one to be member of the minority party in the State) "possessing knowledge of, and training in the subject of taxation and taxing laws, and skilled in matters pertaining thereto," devoting their entire time to duties of the office, constitute a State Board of Equalization, with supervision of local assessments.

CORPORATIONS.—The real and personal property of corporations in the State are taxed as other property under the general property tax. Domestic business corporations pay as a corporate tax an annual tax of $5.00 if the authorized capital does not exceed $50,000;

$10.00 if it exceeds $50,000 and does not exceed $200,000; $50.00 if it exceeds $200,000 and does not exceed $500,000; $75.00 if it exceeds $500,000 and does not exceed $1,000,000; and the further sum of $50.00 per annum per million dollars or any part thereof in excess of one million dollars. This franchise tax is in addition to the general property tax on property located in the State. Buildings within and without the right of ways and fixtures are taxed as other property by cities and towns.

RAILROADS.—Railroads pay an annual license tax based on gross receipts of transportation within the State. Each city or town in which any stock of railroad is held, is entitled to an amount equal to 1 per cent of the value of such stock as determined by the State Board of Assessors, provided the total receipts from this source are sufficient to cover such payment. This tax based upon gross receipts within the State has been sustained as not a tax upon interstate commerce. (See *supra*, p. 249.)

Street railroads are taxed as other railroads. For the specific rates, see statute. Sleeping car and other companies pay an excise tax of 9 per cent on gross receipts of business done wholly within the State, in lieu of all other taxes on cars and equipments.

PUBLIC UTILITIES.—For the excise taxes imposed on telephone and telegraph companies, press companies, and insurance companies, see statute.

BANKS.—Shares in banks and moneyed corporations are assessed to holders, less assessed value of corporate property.

POLL TAXES.—A poll tax is assessed upon every male inhabitant of the State above the age of twenty-one years, whether citizens or aliens, with specified exemptions. The poll tax is not to exceed three dollars, and not to be less than one dollar, and is assessed upon each taxable person at the place where he resides on April first. In practice, the poll tax inures to the benefit of towns.

INHERITANCE TAX.—There is a direct inheritance tax enacted in lieu of the collateral inheritance tax theretofore existing, whereunder all property within the jurisdiction of the State and any interest therein, whether belonging to the inhabitants of the State or not, and whether tangible or intangible, passing by will or intestacy, is made subject. Property transferred for the use of any educational, charitable, religious, or benevolent institution in the State, the property of which is by law exempt from taxation, is exempt from this tax.

The exemption from inheritance tax in the case of husband, wife, child, natural or adopted, of $10,000; and in other cases $500.00. When the property transferred exceeds in value the exemptions, and does not exceed $50,000, the rate is 1 per cent; if it is in excess of $50,000, and not more than $100,000, 1½ per cent; and above $100,000, 2 per cent. When the property is transferred to a brother, sister, uncle, aunt, nephew, niece or cousin, the rate of 4 per cent for $50,000; and for more than $50,000 and not more than $100,000, 4½ per cent; and over $100,000, 5 per cent. Where the property is transferred to others, the rates are 5 per cent under $50,000; 6 per cent between $50,000 and $100,000; and 7 per cent for $100,000.

The exemption of property of non-residents, whose own States assess no tax upon the personal property of male residents, was repealed by Act of 1917.

EXEMPTIONS.—The exemptions include the personal property of literary and scientific institutions, the real and personal property of all benevolent and charitable institutions incorporated by the State, and, to a specified extent, the property of colleges; also household furniture not exceeding ten hundred dollars to each family, wearing apparel, farming utensils, mechanic's tools necessary for his business, and musical instruments not exceeding fifty dollars to each family; also churches and parsonages; also live stock under specified ages, agricultural products in possession of producer, planted forests (on application) for twenty years, and mines for ten years from opening. Bonds issued by State, or any county or municipality thereof also exempt; and all loans of money secured by mortgage on real estate in the State deposited in banks and trust companies, are exempt from municipal taxation.

COLLECTIONS.—Taxes are assessed as of April 1, annually. Incorporated towns may fix time of payment therein. Taxes on real estate must be paid before first Monday in February of year succeeding assessment, when land may be sold, subject to right of non-residents to redeem within one year, and of residents within two years.

(See report of State Board of Assessors, 1915.)

MARYLAND

(Constitution as Amended in 1915.)

"Constitutional Provisions: Declaration of rights: Art. XIV. That no aid, charge, tax burthen or fees ought to be rated, or levied, under any pretense without the consent of the legislature.

"Art. XV. (As amended November 2, 1915) That the levying of taxes by the poll is grievous and oppressive and ought to be prohibited; that paupers ought not to be assessed for the support of the government; that the General Assembly shall, by uniform rules, provide for separate assessment of land and classification and subclassifications of improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State government, and by the counties and by the City of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy; yet fines, duties or taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community."

(Amendment of 1916 to Sec. 52 of Art. 3, providing for a budget system in all appropriation bills except supplemental appropriation bills.)

HOME RULE.—Under amendment of 1915 the legislature has conferred home rule as to local taxes on all towns and cities in the State, giving them the right, subject to the laws of the State, to determine what classes of property should be the subject of taxation. (See Act of 1916.)

The system of taxation in Maryland has been described as practically one of separation of the sources of taxation. The ordinary expenses of the State government are paid by indirect taxation, the chief sources of which are the collateral inheritance tax, share of liquor license in Baltimore City, gross receipts tax of railroads, and certain other classes of corporations, traders' licenses, excess fees of officers, receipts of State institutions, interest on investment, and the tax on intangibles at a fixed rate.

ADMINISTRATION.—There is a State Tax Commission of three members, with powers of supervision and equalization. (See Tax Commission v. Lowenstein, 128 Md. 327.)

RAILROADS.—Railroads pay a graduated tax based on domestic gross receipts per mile for the first 1000 or less 1¼ per cent, and from 1000 to 2000, 2 per cent and 2½ per cent upon the gross receipts above 2000. Interstate railroads pay the proportion of gross receipts based upon the mileage in the State to the total mileage. (The B. & O. Railroad has a special contract with the State as to tax on gross receipts, see laws of 1878, ch. 155). Railroads are exempt

from other taxation for State purposes, but are taxed locally on real and personal property as individuals.

PUBLIC UTILITIES.—Telegraph, cable, express, transportation, parlor cars, sleeping cars, safe deposit and trust companies pay 2 per cent on gross receipts. Telephone and oil pipe companies, guarantee and fidelity companies, title insurance companies, 1 per cent; electric light companies 1½ per cent of gross receipts or electric construction and gas companies incorporated and doing business in Maryland, and 1½ per cent of gross receipts of guana, phosphate or fertilizer companies wherever incorporated.

CORPORATIONS.—Business corporations pay the ordinary property tax on real and personal property, and foreign corporations except those taxed on gross receipts as above are subject to a special graduated tax based on capital employed in the State. There is a system of special taxes and licenses imposed upon occupations to which corporations as well as individuals are subject.

CORPORATE STOCKS.—Stocks in domestic corporations are exempt, but stocks in foreign corporations are assessed at actual value, and taxed to the individual holders at the rate of 16 cents for State and 30 cents for local purposes. Such tax held constitutional, see Wilkins Co. v. Baltimore, 103 Md. 293.

BANKS.—Are assessed locally on real estate, as other corporations; and the shares are assessed to the stockholders, less assessed value of real estate, and paid through the corporation.

INHERITANCE TAX.—There is no direct inheritance tax law, but a collateral inheritance tax amounting to 5 per cent on every $100 of value where the estate is left to other than the parents, husband, wife or children, or lineal descendants, there being no tax if the estate is less than $500.

The property of residents and non-residents found within the jurisdiction of the State is subject to the taxes, irrespective of the domicile of the decedent. (State v. Dalrymple, 70 Md. 294.)

MORTGAGES.—Mortgages are subject to taxation at the rate of 8 per cent per annum on the interest paid on the mortgage; but this act is repealed in all but three counties, so that mortgages are exempt in twenty counties and in Baltimore City.

EXEMPTIONS.—No person who is not assessed to the amount of $100 is required to pay a tax. All household furniture and effects

held for household use are exempt from taxation for local purposes to the extent of $500. (See Act of 1916, c. 393.)

ASSESSMENTS.—Assessments are not annual, but continuing, subject to change on demand of the public authorities or on application of the property owner.

There is a rate of 45 cents on securities, including all bonds and certificates of indebtedness issued by corporations.

Taxes are payable in the counties at any time before the end of the year, interest and costs accruing if not then paid.

COLLECTIONS.—In Baltimore City taxes on personal property are in arrear on May 1st, and, on real property, July 1st in the year; and thirty days thereafter a penalty of 3 per cent is added. Property is sold for taxes in the third year, redeemable by the owner on payment of purchase money with interest at 6 per cent and costs and expenses, in Baltimore, at any time within a year and a day, and in the counties at any time within twelve months.

State taxes are due July 1st and after September 1st bear interest.

A uniform plan of tax assessment in counties throughout the State was adopted in 1916. (See Act of 1916, ——.)

MASSACHUSETTS

Declaration of Rights, Art. X. No part of the property of any individual can, with justice, be taken from him or applied to public uses, without his own consent or that of the representative body of the people.

Part 2, Ch. 1, Art. IV. The general court has power to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying within the said commonwealth. (For a full statement of the Massachusetts system of taxation and the practical exemption of mortgages thereunder, see the report of the Tax Commission of 1897.)

Amendment to Constitution adopted November, 1912:

"Full power and authority are hereby given and granted to the general court to prescribe for wild or forest lands such methods of taxation as will develop and conserve the forest resources of the Commonwealth."

Amendment to Constitution adopted November 2, 1915:

Full power and authority are hereby given and granted to the general court to impose a tax on income in the manner hereinafter provided. Such tax may be at different rates on income derived from different classes of property, but shall be levied at a uniform rate throughout

the commonwealth when income is derived from the same class of property. The general court may tax incomes not derived from property at a lower rate than incomes derived from property, and may grant reasonable exemptions and abatements. Any class of property, the income from which is taxed under the provisions of this article, may be exempted from the imposition and levied in proportional and reasonable assessments, rates and taxes, as at present authorized by the Constitution. This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

ADMINISTRATION.—An appointed tax commissioner, who is also commissioner of corporations, has supervision over assessments; and under him there are three supervisors of assessments with power over local boards of assessors. Jurisdiction is vested in the court to hear complaints as to assessors and grant abatements.

POLL TAX.—A poll tax is assessed upon every male inhabitant above the age of 20 years, whether citizen or alien, and payment is made a requirement for voting.

INCOME TAX.—The income tax law enacted in 1916, which was prepared by special commission, has been termed in effect a "partial" as distinguished from a "general" income tax law. It applies to income:

First—At the rate of 6 per cent derived from intangible property theretofore exempted upon the payment of such tax. There is an allowance for indebtedness to the extent that the taxpayer may deduct such proportion of the interest paid on his total indebtedness as the income which he derives from taxable intangible property bears to his total income from all sources, and an exemption of $300.00 of income from taxable intangible property to persons whose total income from all sources does not exceed $60.00.

Second—An income tax of 1½ per cent is levied upon income derived from annuities, trades and professions subject to an exemption of $2,000.00 of professional or business income, and a further exemption of $500.00 for a married person and of $250.00 for each child under the age of 15 years, or for a parent dependent upon the taxpayer for support; but provided that in no case will this total exemption exceed $1,000.00. In the case of annuities there is an exemption of the same sort as in the case of income from intangible property.

Third—There is a tax of 3 per cent upon the excess of gains over losses resulting from purchases or sales of intangible personal property. This applies to the individual speculator as well as to a banker or broker.

Under this income tax law the taxpayer must make a return of his personal estate, and in default is liable to the assessment of the local tax.

INHERITANCE TAX.—The inheritance tax law applies to all property within the jurisdiction of the State and every interest therein belonging to the inhabitants, and all real estate within the State belonging to non-residents. Devises to charitable, educational or religious societies are exempted from the act. The taxes are graded according to the degree of relationship, there being no tax on $1,000 or under, and in case of husband, wife, father, mother, child, adopted child, adopted parent, no tax on share of $10,000 or under.

FOREIGN CORPORATIONS.—A foreign corporation is subject to taxation locally on all its real estate where located, and is subject to an excise tax of one-fiftieth of 1 per cent of the par value of its authorized capital stock, but the amount of the excise tax shall not in any year exceed $2,000. This tax was held valid by Supreme Court of United States. See Sec. 196, *supra*. As to limitations of power to tax foreign franchises, see Glue Co. v. Commonwealth, 195 Mass. 528.

EXEMPTIONS.—Exemptions include bonds of the State, counties and municipalities, and bonds and other debts secured by mortgage on real estate in the State, and bonds secured by mortgage on tangible property within or without the State when an annual fee is paid and the bond registered; property of religious, educational and certain other societies and corporations to the extent of $500.00 where the estate does not exceed $1,000.00 to widows, unmarried women above the age of 21 years, persons over 75, and any minor whose father is deceased; also wearing apparel, farming utensils, household furniture not exceeding $1,000.00, and necessary tools of mechanic not exceeding $300.00; also property of soldiers and sailors to a limited extent, and cattle of limited age; also plantations of timber lands in certain cases.

CORPORATIONS.—Railroads are subject to a general corporation tax which is based, as in case of other corporations, upon the value of the shares of capital stock less items locally taxed and others beyond the jurisdiction of the State. The tax on "corporate excess" is paid directly into the State Treasury. Apportionment is made where the lines extend beyond the jurisdiction of the State.

The same principle is applied in the assessment of public utility and other corporations. This corporation tax is, in addition to the tax upon real estate, locally taxed.

BUSINESS CORPORATIONS.—The principle of the assessment of "corporate excess" has been modified in the case of general business companies in that there is a deduction of value of real estate and machinery and of property which is subject to taxation in another State. The tax is not to exceed 20 per cent in excess of the value of real estate, machinery and merchandise, and is not to be less than one-tenth of 1 per cent of the market value of the capital stock. Acts of 1907, ch. 395. As to power of State in imposing excise taxes, see Opinion of Justices, 195 Mass. 607.

APPORTIONMENT OF TAX ON CORPORATE EXCESS.—The amount raised by the taxes on corporate excess is distributed to parks in towns and cities in proportion to the number of shares held by citizens thereof in each town. The remainder which represents the tax on shares of stock held outside of the State remains in the State Treasury.

BANKS.—Shares of stock in banks, national or state, are assessed locally to the owners, and not to the State Tax Commission. The bank advances the tax. The revenue obtained is apportioned among the towns and cities where the shareholders reside, and the State receives as its share the levy on the foreign shareholders.

INSURANCE.—Life insurance companies, domestic and foreign, pay an excise tax of one-fourth of 1 per cent per annum on the net value of all policies in force and held by residents. Domestic insurance companies other than life, and except companies liable to taxation on corporate franchise, pay 1 per cent on net premiums, except the premiums received in other States where they are subject to like tax, and 1 per cent on all assessments made by the company upon policy holders. All other foreign insurance companies pay 2 per cent on net premiums charged and received in Massachusetts. There is also provision for retaliatory taxation.

It may be said that substantially all the tangible estate subject to income tax as above is exempt from other taxation. A surplus of indebdtedness is not deducted from other items of personal estate.

COLLECTIONS.—Return of property subject to taxation on April 1st of each year is made on a date fixed by local assessors usually the month of May. Payment of taxes is fixed by the towns between October 1st and January 1st. Income taxes are payable on or before the 15th of October. Local Tax Commissioner is charged with the collection of income taxes in the same manner as of personal taxes; that is, by distress and sale, by arrest and imprisonment.

Taxes assessed on real estate are a lien from April 1st, and if not paid within 14 days after demand, sale may be made of the smallest undivided part of the real estate sufficient to discharge the taxes and charges, or of the whole property, if necessary. The deed when recorded is *prima facie* evidence of all facts essential to its validity. The owner may redeem within two years after a sale by paying taxes, costs and interest at the rate of 8 per cent.

The Supreme and Superior Courts have jurisdiction in equity of all cases of sale or taking of real estate for taxes, if relief is sought within five years.

MICHIGAN

(New Constitution adopted in 1908.)

Art. X, Sec. 1. (Provides for the primary school, university, and other educational funds in the order named.)

Sec. 2. (Provides for a tax sufficient to pay the estimated expense of State government and interest on State debt.)

Sec. 3. The legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be provided by law: Provided, that the legislature shall provide by law a uniform rule of taxation for such property as shall be assessed by the State Board of Assessors; and the rate of taxation on such property shall be the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property upon which *ad valorem* taxes are assessed for State, county, township, school and municipal purposes.

Sec. 4. The legislature may by law impose specific taxes which shall be uniform upon the classes upon which they operate.

Sec. 5. The legislature may provide by law for the assessment at its true cash value by the State Board of Assessors, of which the Governor shall be ex officio a member, of the property of corporations, and the property by whomsoever owned, operated or conducted, engaged in the business of transporting passengers and freight, transporting property by express, operating any union station or depot, transmitting messages by telephone or telegraph, loaning cars, operating refrigerator cars, fast freight lines, or other car lines, or running or operating cars in any manner upon railroads, or engaged in any other public service business, and for the levy and collection of taxes thereon.

Sec. 6. Every tax law shall distinctly state the objects.

Sec. 7. All assessments hereafter authorized shall be on property at its cash value.

Sec. 8. In the year 1911 and every fifth year thereafter, or at such other times as the legislature may direct, the legislature shall provide by law an equalization of assessment by the State Board of all taxes on property except that fixed under laws passed pursuant to Sections 4 and 5 of this article. (By an act of the legislature the Board meets every third and fifth year, beginning in 1911.)

(Held in State Tax Commissioners v. Grand Rapids Board of Assessment, 124 Mich. 491, that this section did not prevent the organization of a Board of State Tax Commissioners.)

Sec. 9. (Prohibits the surrender or suspension of the power of taxation by any grant or contract.)

Sec. 10. (Prohibits the contracting of State debts in the aggregate in excess of $250,000.00.)

Sec. 11. (Prohibits the issue of scrip or other form of State indebtedness except for debts expressly authorized by the Constitution.)

Sec. 12. (Prohibits the granting of State aid in aid of any person, association, or corporation.)

Sec. 13. (Prohibits the subscription by the State to the stock of any company or association.)

Sec. 14. (Prohibits the State from being a party to or interested in any work of internal improvement, except the public wagon roads and the necessary forestation and the protection of State lands.)

Sec. 15. (Regulates the deposit of public money.)

Sec. 16. (No money to be paid out of the treasury except in pursuance to appropriation.)

ADMINISTRATION.—The Board of State Tax Commissioners consists of three members appointed by the Governor, and this Board, including the Governor, who is a member ex officio, forms the State Board of Assessors provided for by Section 5 of Art. X of the Constitution.

The State Board of Equalization consists of the Secretary of State, the Auditor-General, the Superintendent of Public Instruction, the State Treasurer, and Chairman of the Board of State Tax Commissioners.

All property, real and personal, within the jurisdiction of the State, not expressly exempted, is subject to the general property tax.

EXEMPTIONS.—Exemptions in addition to public property, include property of libraries, benevolent, charitable, educational and scientific institutions, houses of public worship and parsonages, cemeteries, property of State and local agricultural societies, parks, and armories; real estate owned as a homestead by a soldier or sailor of the Federal Government, who served in the Civil or Mexican War, or the wife or widow of such, to the value of $1,000.00; property of posts of the Grand Army of the Republic and of the Women's Relief Corps, personal property of Sons of Veterans, Union Veterans' Union, and Young Men's Christian Associations, and similar associations; funds of fraternal benevolent societies, pensions received from the United States, *bona fide* debts, property of Indians who are not citizens; libraries, family pictures, school books, one sewing machine used and owned by each

individual family, wearing apparel of every individual, household furniture, provisions, and fuel to the value of $500.00 to each household; working tools of any mechanic to the value of $100.00; fire apparatus of organized companies; all mules, horses and cattle not over one year old, all sheep and swine not over six months old, all domesticated birds; personal property owned and used by any householder in connection with his business to the value of $200.00; all property of the Woman's Auxiliary Society of the University of Michigan, and all municipal bonds.

MORTGAGES.—Mortgages are subject to a recording tax of fifty cents for each $100.00 and each remaining fraction thereof of the debt secured by the mortgage upon real property situated in the State recorded on or after January 1st, 1912. This tax is divided equally between county and State and is collected by the County Treasurer. Any instrument creating a lien on real estate or executory contracts for the sale of real estate and deeds given to operate as security for a debt are deemed to be mortgages for the purposes of the act. This tax on mortgages is in lieu of all other taxes. In 1913 this tax on mortgages was extended to those recorded outside of the State securing debts originating in the State. The mortgage recording tax held valid in Union Trust Co. v. Detroit, 170 Mich. 692.

SECURED DEBTS, as defined in the statute (see Act of 1913, page 242), including bonds secured by mortgage in any State or country other than Michigan and not recorded in Michigan, and bonds issued by any foreign country or by any State or municipality, are subject to a tax, payable to the county, of one-half of 1 per cent on the face value; and the payment of this tax exempts from further taxes under the laws of the State.

CORPORATIONS as a rule pay taxes upon their property the same as individuals, and all corporations, foreign and domestic, pay a franchise tax of one-half of one mill on each dollar of capital stock, or any increase thereof, the minimum fee being five dollars.

The State Board of Assessors makes an annual assessment of railroads and certain other public utility corporations, under the rule fixed by Section 3, Article X, of the Constitution.

As to general rule for assessment of corporations, see Citizens Street Railway v. Common Council of Detroit, 125 Mich. 673.

Money deposited in banks is assessed not as chattels but as credits. Radiator Co. v. Wayne County, 192 Mich. 449.

BANKS are assessed upon their real estate, the shares being assessed at their actual cash value, less the value of the real estate, to the stockholders and at the place where the bank is located, except that shares owned by residents of the county in which the bank is located are assessed to the owner where he resides. First National Bank v. St. Joseph, 46 Mich. 326.

INHERITANCE TAX.—The inheritance tax law imposes a tax upon the transfer of any property by will or intestacy over the value of $100.00, whether by a resident of the State or where the transfer is of any property within the State when the decedent was a non-resident of the State at the time of his death. When an inheritance passes to a direct heir of decedent, no tax is collected except on personal property valued at $2,000.00 or over, in which case the rate is 1 per cent.

The tax is for the use of the State and is applied to educational purposes and to the payment of principal and interest of the State debts. The amount of inheritance tax is determined by the Probate Court, and the Insurance Commissioner is directed, upon application of any judge of the Probate Court, to determine the value of any future or contingent estate.

LICENSES.—As to licenses upon different business and occupations, see statute.

FOREIGN LIFE AND INSURANCE COMPANIES other than life, are taxed 2 per cent of their gross premiums, and fire insurance companies pay a tax of 3 per cent. A retaliatory tax is levied upon insurance companies of other States which levy heavier taxes on Michigan companies.

POLL TAX.—There is no State or county poll tax, but villages have power to levy a poll tax on males between the ages of 21 and 60 to pay for the general highway fund.

COUNTY AND MUNICIPAL TAXATION.—For county and municipal taxation, the property included in the assessment and equalization is the same as in State taxation. The assessment of all property is made annually. The State Board of Tax Commissioners is supervisory board over the assessment officials and has power to compel an observance of the law.

ASSESSMENT.—There is no equalization, so-called, between individuals, but excessive assessments and under-valuations may be corrected by the local Board of Review in the township, or by the County

Board of Supervisors, or by the Board of State Tax Commissioners. The State Board of Equalization in every consecutive third and fifth year after 1911 equalizes the valuation of all property in the State.

Deduction of debts from credits in listing personal property held valid in Stumpf v. Storz, 156 Mich. 228.

COLLECTIONS.—General taxes are assessed on the second Monday of April in each year. The State, county and school taxes are payable on December 1st. On March 1st a list is made of all land on which the tax is delinquent. All taxes create a lien on land and personal property, and lands may be sold for payment of taxes. Taxes are delinquent on the 10th of January, when the collection fee becomes 4 per cent; and in case payment is not made, the treasurer collects by seizure and sale.

MINNESOTA

(Constitution as amended 1906, Art. IX, Sec. 1.)

"Article IX, Sec. 1. The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes, but public burying grounds, public schoolhouses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, and public property used exclusively for any public purposes, shall be exempt from taxation, and there may be exempted from taxation personal property not exceeding in value $200, for each household, individual, or head of a family, as the legislature may determine.

"Art. IV, Sec. 32a. Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this State, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this State a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote of the people of the State and be adopted and ratified by a majority of the electors of the State voting at the election at which the same shall be submitted to them."

ADMINISTRATION.—There is a Tax Commission charged with the duty of supervision, equalization and recommendation.

RAILROADS.—Railroad companies, in lieu of all other taxes and assessments upon their property within the State owned and operated for railroad purposes, pay into the State Treasury 5 per cent of the

gross earnings derived from the operation of their lines within the State, including a portion of the entire earnings based upon the proportion of the mileage within the State to the entire mileage. It is defined as a property tax based upon earnings. (See State v. Express Co., 114 Minn. 346. See also Sec. 254, *supra.*)

PUBLIC UTILITIES.—Sleeping car companies are taxed on the same basis. Express companies pay 6 cents on their gross earnings (sustained by Supreme Court of U. S., *supra*, Sec. 254), telephone companies 3 per cent on their gross earnings. Telegraph companies are assessed by the State Tax Commission on the basis of the value of the entire system. Trust companies not receiving deposits subject to check, pay 5 per cent on their gross earnings.

Trust companies that do a banking business are assessed and taxed the same as banks.

BANKS.—The stock of national and State banks is assessed to the holders, and the real estate assessment is deducted the balance of stock valuation being extended on basis of 40 per cent.

INSURANCE COMPANIES.—Insurance companies pay a sum equal to 2 per cent of their gross premiums on business in the State.

MORTGAGES.—There is a mortgage recording tax. If the mortgage by its terms is payable not more than five years after its date, the tax is 15 cents on each $100; if more than five years it is 25 cents. The payment of the registry tax exempts the mortgage from all other tax. The mortgage recording taxes are apportioned one-sixth to revenue fund of the State, one-sixth to the county revenue fund, and the balance divided equally between the school district and the city or town where the property is located. (This law held valid in Ins. Co. v. County of Martin, 104 Minn. 179. See also 117 Minn. 192.)

MONEY AND CREDITS.—Money and credits in lieu of all other taxes are subject to an annual tax of three mills on each dollar. The proceeds are apportioned in the same manner as the mortgage recording taxes. (This classification was held valid in State v. Minn. Tax Com., 117 Minn. 192 (1912) 1.)

Grain in elevators and vessels navigating the international waters, are subject to specific taxes.

CLASSIFICATION.—All real and personal property in the State which is not subject to a gross earnings or other tax in lieu thereof, or specifically exempted from taxation, is subject to a classified general property tax. (See Chap. 483, Laws of 1913.)

Property subject to this tax is divided into four classes, and each class assessed at a different percentage of the "true and full value." The first class covers iron ore, whether mined or in the ground, and assessed at 50 per cent of its value. The second class covers household goods assessed at 25 per cent of its full value. The third class covers live stock, agricultural products, merchandise, manufacturer's materials and products, tools, implements and machinery, and all unplatted real estate assessed at 33⅓ cents of its full value. The fourth class covers all platted real estate not included in the first three classes and is assessed at 40 per cent of its full value. The assessor, in valuing property, is required to set down the true and full value of the article of personal property and the tract of real estate assessed by him, and to enter in a separate column the assessed value according to the class in which the property belongs.

POLL TAX.—There is also a poll tax assessed at the rate of $1.50 per day for each male inhabitant within the age of 21 and 50 years, except paupers and insane persons, in labor of not less than one nor more than four days' road labor. A person subject to the tax must furnish an able-bodied substitute or commute for the labor at that rate of $1.50 per day.

INHERITANCE TAX.—An inheritance tax is levied upon the transfer of any property in the State by will or intestacy, or in contemplation of death, by any resident, or of any property by a non-resident, within the State or the jurisdiction of the State, with an exemption of $10,000 to the husband or widow or lineal child or adopted children, $3,000 to a lineal ancestor, $1,000 to a collateral relative, with exemptions of collateral relatives from $1,000 to $100, according to the degree of relationship; $2,500 to charities within the State, and a full exemption of any devise to any municipal corporation in the State, the rates varying from 1 per cent to wife or lineal issue where the amount does not exceed $15,000, to 15 per cent to remote collaterals and strangers in blood in excess of $100,000.

EXEMPTIONS.—Exemptions include property held for religious, charitable and educational uses, libraries, personal property of individuals up to $100, agricultural societies, fraternal, beneficial associations, armories and drill halls, uniforms, arms and equipment of national guard up to $200.

ASSESSMENT.—Assessment is made with reference to holding on May 1st. Real property assessed each even numbered year. Personal property is assessed annually.

Counties receive 10 per cent of inheritance tax; balance goes to the State.

COLLECTIONS.—The lien of the State attaches on the first Monday in January and personal property is listed as of May 1st and taxes become delinquent March 1st, and is thereafter subject to penalty of 10 per cent added. On real estate a penalty of 10 per cent is added on the first of June unless one-half the tax is paid, in which case no penalty attaches until November 1st, when the penalty is added to the unpaid tax. On the first Monday in January the additional penalty of 5 per cent is added and the tax becomes delinquent. Judgment is entered by the County Auditor against the land and when the three years' time redemption expires notice is given and if not redeemed the purchaser's title becomes absolute 60 days thereafter.

MISSISSIPPI

(Constitution.)

Sec. 70. No revenue bill or any bill providing for assessment of property for taxation shall become a law except by a vote of at least three-fifths of the members of each House, present and voting. (As to enforcement of this section, see Hunt v. Wright, 70 Miss. 298.)

Sec. 80. Provision shall be made by general laws to prevent the abuse by cities, towns, and other municipal corporations, of their powers of assessment, taxation, borrowing money and contracting debts.

Sec. 90. (The legislature prohibited from passing local and special laws exempting property from taxation or from levy of taxation.)

Sec. 100. No obligation or law of any person, association or corporation held or owned by this State, or levee board, or any county, city or town thereof, shall ever be remitted, released or postponed, or in any wise diminished by the legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury.

Sec. 112. Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax *per capita* upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessments as in other cases of property situated and assessed in the county.

Sec. 178. Corporations shall be formed under general laws only. . . . In assessing for taxation the property and franchises of corporations having charters for a longer period than ninety-nine years, the increased value of such property and franchises arising from a longer duration of their charter shall be considered and assessed; but any such corporation shall have the right to surrender the excess over ninety-nine years of its charter.

Sec. 182. The power to tax corporations and their property shall never be suspended or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, except that the legislature may grant exemptions from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period not exceeding five years. . . . (Provided that the legislature shall grant such exemptions for five years or less by general laws.)

Sec. 192. (Providing that cities and towns may, by general laws, be authorized to encourage the establishment of manufactories, etc., within the limits of the city by exempting property used for such purposes from municipal taxation for a period longer than ten years.)

Sec. 195. The rolling stock of a railroad company is considered personal property.

Sec. 243. A poll tax of two dollars, in aid of common schools and for no other purpose, is imposed on males between twenty-one and sixty years of age.

ADMINISTRATION.—A Board of State Tax Commissioners was created in 1916 consisting of three members appointed by the Governor with the advice and consent of the Senate for a term of four years, and are required to give their entire time to the duties of their office. This commission is authorized to adjust and equalize valuation throughout the State and one or more of its members must visit every county in the State each year to confer with local assessors, and has powers of investigation and recommendation. The county assessors are elected and the Sheriff is *ex-officio* tax collector. The county boards of supervisors sit as boards of equalization.

GENERAL PROPERTY TAX.—All property, whether of corporations or individuals, unless exempt, is subject to the General Property Tax paid locally for State and local purposes. Property of railroad, express, sleeping car, telegraph and telephone companies used in their business, is assessed by the Railroad Commission. All other taxable property is assessed by the local assessors.

RAILROADS.—Railroads are taxed for State and local purposes upon the value of their property; and an additional State tax in the

nature of a privilege tax, is levied. The value of the franchise and the capital stock engaged in business in the State, is considered; and the value is then apportioned to counties and municipalities. Real estate not used in the railroad business, is assessed locally. Telegraph, telephone, express, sleeping car, palace car, and dining car companies are assessed for *ad valorem* taxation in the same manner as railroads. They are also subject to privilege taxes for State purposes.

(As to privilege tax on telegraph companies, see U. S. Telegraph Cable Co. v. Adams, 155 U. S. 688. As to privilege taxes on express companies, see Code of 1906, Sec. 3810, as amended, Laws of 1910, ch. 94, Sec. 14. As to privilege tax on railroads, see Code, Sec. 3856, amended by Laws of 1912, ch. 102.)

Counties and municipalities are prohibited from levying a similar tax on telegraph, express, or sleeping car companies. (See Code 1906, Sec. 3909.)

FREIGHT LINE AND EQUIPMENT COMPANIES.—Freight line and equipment companies pay the State for State purposes, in lieu of all other taxes, a gross earning tax of 3 per cent. (See Laws of 1912, ch. 113 and 114.)

BUSINESS CORPORATIONS.—Business corporations other than the foregoing, pay not only the General Property Tax, but, as practically all of these classes of corporations do, pay locally a privilege tax for State purposes. Certain kinds of manufacturing plants are exempt from State, county and levee taxation for the first five years of their establishment; and municipalities may grant such exemption for ten years. (See Laws of 1912, ch. 115.)

FOREIGN CORPORATIONS.—By Act of 1916, the law fixing fees to be paid by foreign corporations filing their charters or certificates of incorporation, was amended so as to place foreign and domestic corporations on an equal footing with respect to such fees, thus substantially increasing the fees paid by foreign corporations.

INCOME TAX.—There is a State income tax of five mills on the dollar on all annual incomes which exceed $2500. Where income is derived from property on which an *ad valorem* tax is paid the amount of said tax is deducted from the income. Each person is required to fill a blank, showing the amount of income from all sources, and for-

ward same to State Auditor, who notifies County Collector of amount to be collected in county. (See Laws of 1912, Chap. 101.)

BANKS.—Bank stock both State and national is assessed to the shareholders upon a statement by the bank officers of the value of the shares exclusive of the real estate owned by the bank. The taxes on such shares of stock is paid by the bank. The real estate of the bank is taxed as other real estate.

ASSESSMENT.—Property in this State is subject to one assessment for State, county and municipal purposes. The taxpayer must furnish to the assessor a sworn list of all taxable property in his hands on the first day of February. Lands are assessed between February first and July first in every second year. Valuation of lands may be given by the owner, but is subject to revision by the Board of Supervisors. Property is valued at the price it would bring at a voluntary sale.

EXEMPTIONS.—Property exempt from taxation, in addition to public property and property used for religious, charitable and educational purposes, includes wearing apparel, provisions for family consumption, farm products in the hands of the producer, one gun for each owner, poultry, household furniture to the value of $250, two cows and calves, 20 head of sheep, 10 head of hogs, colts under three years of age, farming implements, property of agricultural and mechanical associations, all libraries and all works of art, and mechanics' tools, certain factories for five years, and municipalities may grant exemption to certain factories for ten years, all State, county and municipal levee and school bonds issued after April 1, 1906. All notes and evidences of indebtedness and all money loaned at a rate not exceeding 6 per cent; grain separators, harvesters, feed crushers, and cutters, rice and flouring mills of 20 horse-power are exempt for a period of five years from 1912.

PRIVILEGE TAXES.—A large amount of revenue is derived from an elaborate system of privilege taxes for State revenue. (See Act of 1916, ch. 89, 90, 91 and 94.)

POLL TAX.—A State poll tax of two dollars is levied upon every male over twenty-one and under sixty. Failure to pay the poll tax prevents voting at any election.

LEVEE DISTRICT TAXATION.—This is an important feature of the taxing system of the State, and it has been said that the locality

embraced in the territory between the Mississippi and the Yazoo Mississippi Delta levee district is one of the most heavily taxed districts in the United States. (See Laws of 1902, ch. 80, Privilege Tax Laws of the Yazoo Mississippi Delta District, 1910.)

COLLECTIONS.—Taxes become delinquent on December 15 of each year. Taxes on personal property are collected immediately after such date by distress and sale. After January 15th of each year the tax collector advertises the sale of land for taxes on the first Monday in April. Taxes are a lien from February 1st of the year of assessment.

MISSOURI

(Constitution.)

Art. X, Sec. 1. The taxing power may be exercised by the General Assembly for State purposes and by counties and other municipal corporations under authority granted to them by the General Assembly for county and other corporate purposes.

Sec. 2. The power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly.

Sec. 3. Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

Sec. 4. All property subject to taxation shall be taxed in proportion to its value.

Sec. 5. All railroad corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal and other purposes on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock.

Sec. 6. The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies; Provided, that such exemption shall be only by general law.

Sec. 7. All laws exempting property from taxation, other than the property above enumerated, shall be void.

Sec. 8. (The State tax is limited to 15 cents on $100 valuation, the taxable property of the State having reached $900,000,000.)

Sec. 10. The General Assembly shall not impose tax upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but, may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

Sec. 11. Taxes for county, city, town or school purposes may be levied on all subjects and objects of taxation, but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes.

(The tax rate for county, city and town purposes is limited according to population with provision for increase for purpose of erecting public buildings, or by popular vote for the purpose of erecting school buildings. For an amendment thereto held void as violative of Fourteenth Amendment, see State *ex rel.* v. Railway, 195 Mo. 228.)

Sec. 12. (The municipal indebtedness is limited to not exceeding 5 per cent of the value of taxable property with provision for an increase by two-thirds of voters' vote for the erection of county buildings or necessary roads and bridges.)

Sec. 12a. (Cities of between 2000 and 30,000 inhabitants with the assent of two-thirds of the voters voting are allowed to become indebted to not exceeding 5 per cent of the taxable property therein for the purpose of purchasing or constructing waterworks, electric or other light plants to be owned exclusively by the city. St. ex. v. Allen, 183 Mo. 283.)

Sec. 18. There shall be a State Board of Equalization consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. The duty of said board shall be to adjust and equalize the value of real and personal property among the several counties in the State and it shall perform such other duties as are or may be prescribed by law.

(The equalization by this board of the valuation of any class of property under the statute enacted hereunder is controlling and such valuation cannot be raised thereafter by a local board for the taxation of that year. See State *ex rel.* v. Schramm, 269 Mo. 489.)

Sec. 22. (The county court in counties and township boards in counties under township organization authorized to levy a special tax not exceeding 25 cents on $100 to be used for road and bridge purposes.) Adopted, 1908.

LEGISLATION OF 1917.—The revenues of the State under the General Property Tax imposed upon persons and corporations through assessments by local assessors elected by the people (railroads and certain public utilities being assessed by the State Board of Equalization) proving inadequate for the demands of the State, important changes were made by the General Assembly of 1917 (see Session Acts, 1917). These changes include:

TAX COMMISSION.—*First*, the creation of a tax commission of three members appointed by the Governor, whose duty it is to co-operate with the State Board of Equalization in equalizing the assessment of property throughout the State and also to exercise a supervision and investigation of State expenditures, and to make a budget to guide the legislature in making appropriations.

CORPORATION FRANCHISE TAX.—*Second*, a corporation franchise tax on the capital stock and surplus of all corporations, both domestic and foreign, doing business in this State amounting, in addition to all other fees and taxes, to 3/40 of 1 per cent of the par value of the outstanding capital stock and surplus. If the corporation employs a part of its capital stock in business in another State or country, then it pays this franchise tax on that proportion of its capital and surplus employed in the State. The Act does not apply to corporations not organized for profit nor to express companies which pay an annual tax on their gross receipts, nor to insurance companies which pay an annual tax on their gross premium receipts. Annual reports are required to be made by corporations liable for this tax on or before the first day of February, in the form prescribed by the Missouri Tax Commission.

SECURED DEBT TAX.—*Third*, a Secured Debt Tax, whereunder bonds of every State or political subdivision thereof, and any bonds and notes secured by collateral, and any bonds not payable within one year and not secured by collateral, or a mortgage or deed of trust, wholly or in part upon real estate, are made a separate and distinct class for taxation, and are subjected to a tax for State purposes at the rate of five cents per $100 face value for each year the secured debt has to run, up to four years, after which time the tax is twenty-five cents per $100. Taxes not exceeding this rate are authorized for county purposes, and further taxes not exceeding this rate may be levied by cities and incorporated towns. The City of St. Louis, though not in a county, is authorized to levy taxes as a county and as a city.

After the payment of this tax the Secured Debt is exempted from all other or further taxation by the State or any county, municipality or subdivision thereof except that renewals of the debt are taxed as provided in the act.

INCOME TAX.—*Fourth*, an Income Tax of one-half of one per cent levied upon incomes from all sources in excess of $3000 for single persons and $4000 married persons, the general provisions of

the Act being similar to those of the Federal Income Tax. This tax upon incomes is imposed both upon individuals and corporations. The concluding clause of the Act, Sec. 32, provides that the exhibition of a tax receipt upon any real or personal property may be exhibited in payment of the income tax.

INHERITANCE TAX.—In lieu of the Collateral Inheritance Tax of 5 per cent theretofore existing, a direct inheritance tax upon all degrees of relationship was imposed, varying according to the degree of relationship from 1 per cent to 5 per cent, and also progressing according to the amount of inheritance, this rate applying where the amount is $20,000 or less. From $20,000 to $40,000 the rate is double; from $40,000 to $80,000, treble; from $80,000 to $200,000, quadruple; from $200,000 to $400,000 the rates were quintuple, and upon all in excess of $400,000 sextuple. $15,000 are exempted in the case of surviving husband or wife, and $5,000 to direct ancestors or descendants; $250 to brothers or sisters of the father or mother of the descendants or their descendants. The transfers of less than $100 are not subject to any tax. Devises for any religious, educational, or charitable purposes in this State are exempted.

The tax applies to all property passing by will or intestacy from a resident of the State, or to property within the jurisdiction of the State where deceased was a non-resident of the State at the time of his death.

LICENSES.—*Sixth.* State saloon licenses were increased, and a tax also imposed upon "soft drinks," the same being required to be inspected by the Inspector of Beer and Malt Products.

Seventh. A State automobile license was increased by being doubled and appropriated to the Good Roads Fund.

These taxes were all supplemental to the General Property Tax on real and personal property, except in the case of the Secured Debt Tax, *supra.*

EXPRESS COMPANIES AND INSURANCE COMPANIES.—As to taxation of the gross receipts of express companies, see R. S. 1909, Secs. 11,606, 11,612; also as to bridges, telephone, telegraph, car and express companies.

INSURANCE COMPANIES.—For taxation of insurance companies, see R. S. 1909, Sec. 7098, *et seq.* And as to Occupation Tax on insurance agents in cities, see Sec. 7104.

BANKS.—The list of shareholders in banks and banking institutions is delivered by the chief officer of the corporation to the assessor with statement of all property represented thereby—and such shares are valued at "true value in money"—less value of real estate. The tax is paid by the banks for the holders. The valuation of all the banking institutions are equalized by the State Board, in 1916 at 50 per cent of "full value," and this valuation was held controlling in State *ex rel.* v. Schramm, *supra.*

POLL TAX.—There is no State poll tax, but cities of different classes are authorized to levy and collect a poll tax not exceeding $1.50 each year on males between 21 and 60 for street improvements. (See R. S. 1909, Sec. 8588.)

CORPORATE SECURITIES.—The shares of domestic corporations are not taxable, where the corporate property is taxable. The shares of stock in foreign corporations have not been subjected to taxation in the State. State *ex rel.* v. Lesser, 237 Mo. 310, *supra*, Sec. 484. The bonds of corporations, whether domestic or foreign, are subject to taxation except as controlled by the Secured Debt Law, *supra.*

MERCHANTS AND MANUFACTURERS are made a separate class for taxation, and pay an *ad valorem* general property tax on the highest amount of goods in their possession between the first Monday in March and the first Monday in June of each year, this tax being paid in the form of a license which the merchants and manufacturers must take out each year. The counties are prohibited from levying upon such licenses more than 100 per cent more than authorized for State purposes.

The City of St. Louis under special legislative authority, levies a city tax of one-fifth of 1 per cent upon merchants' and manufacturers' licenses in lieu of 1.56 per cent levied upon other property, and in lieu of such reduction in the *ad valorem* tax, the city levies a tax on sales at the rate of $1.00 per thousand. See Am. Mfg. Co. v. St. Louis, 238 Mo. 268.

COLLECTIONS.—Taxes are assessed as of the first day of June of each year and made payable in the year following the assessment. If not paid on or before the last day of December, a penalty of one per centum per month is added as interest until paid; and these penalties with the taxes are a lien upon the property assessed. All taxes remaining unpaid on January 1st which are previously due and payable, are termed "delinquent" or back taxes, and payment of

these taxes is to be enforced by suit and sale of the property, as in ordinary actions. In suits to enforce the payment of taxes on real estate, the procedure is by plenary action, wherein all persons interested in the property are made necessary parties. (For illustration of this procedure in Arizona, adopted from Missouri, see Sec. 374, *supra.*)

MONTANA

Art. XII, Sec. 1. The necessary revenue for the support and maintenance of the State shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for. The legislature may also impose a license tax, both upon persons and corporations doing business in the State.

Sec. 2. The property of the United States, the State, counties, cities, towns, school districts, municipal corporations, and public libraries shall be exempt from taxation; and such other property as may be used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity may be exempt from taxation.

Sec. 3. All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law.

Sec. 4. (Same as Sec. 181, Kentucky Const. 1891, *supra.*)

Sec. 5. (Same as Sec. 11, Missouri Const. 1875, *supra.*)

Sec. 7. (To the same effect as Sec. 228 Const. of La. 1898.)

Sec. 8. Private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law for the funding thereof, and shall provide by law for the payment thereof, by assessment and taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority.

Sec. 11. Taxes shall be levied and collected by general laws and for

public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

Sec. 12. No appropriation of public moneys shall be made for a longer term than two years.

Sec. 16. (Provides for assessment of railroad tracks, rolling stock, etc., by the State Board of Equalization and mileage apportionment.)

Sec. 17. The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the State and has been taxed.

(As amended, 1916.)

Chap. 47, Sec. 15, Art. XII. The Board of County Commissioners of each county shall constitute a County Board of Equalization, and the Governor, Secretary of State, State Treasurer, State Auditor and Attorney General shall constitute a State Board of Equalization. The duty of the County Board of Equalization shall be to adjust and equalize the valuation of taxable property within their respective counties and all such adjustments and equalization may be supervised, reviewed, changed, increased or decreased by the State Board of Equalization. The State Board of Equalization may adjust and equalize the valuation of taxable property among the several counties and the different classes of taxable property in the same and in the several counties and between individual taxpayers; supervise and review the acts of County Assessors and County Boards of Equalization; change, increase or decrease valuations made by County Assessors or equalized by County Boards of Equalization and has such authority and may do all things necessary to secure a fair, just and equitable valuation of taxable property among the counties and between the different classes of property and individuals.

Chap. 48, Sec. 2, Art. XII as amended. The property of the United States, the State, counties, cities, towns, school districts, municipal corporations and public libraries shall be exempt from taxation; and such other property as may be used exclusively for agricultural or horticultural societies, for education or religious purposes, places for actual religious worship, hospitals and places for burial not used or held for private or corporate profit, and institutions of purely public charity may be exempted from taxation. The legislative assembly may authorize the exemption from taxation of evidences of debt secured by mortgages of record upon real or personal property.

ADMINISTRATION.—The system of equalization in the State and counties and the powers of the State Board of Equalization are set out in the Constitution, also the exempt property.

RAILROADS.—The operating property and franchise of railroads, also railroad cars operating in more than one county, are assessed

by the State Board of Equalization. Other railroad property is assessed by the county assessors. The assessment made by the State Board is apportioned among the different counties on the basis of mileage; and to the city, town and school district, on the same basis. Railroads also pay the State for State purposes a graduated license tax, based upon quarterly interstate gross receipts.

PUBLIC UTILITIES.—Express, street railways and other public utilities pay the general property tax, collected locally, for all property; and also pay a license tax, graduated according to population of town where they operate.

CORPORATIONS.—The capital stock and franchise of corporations are listed where the principal office is located. Corporations are assessed on their property the same as individuals. By Act of 1917, a license tax of 1 per cent on the net income of all corporations was imposed.

Foreign corporations are taxed on same basis as domestic.

LIVESTOCK.—Livestock grazing in more than one county is assessed where located at the date of the annual assessment. All money derived from the assessment of livestock after remitting the portion levied for State purposes, is deposited to the credit of the migratory stock fund. The Board of County Commissioners annually apportion the same among the counties where the stock has grazed according to the records of the county.

INSURANCE COMPANIES.—Insurance companies are taxed one-fourth of 1 per cent on the gross premium receipts of such companies, less cancellations and return premiums, which is paid into the State fire marshal fund.

LICENSES.—All insurance and surety companies pay an annual license fixed by the State.

BANKS.—Banks are taxed on real estate the same as other real estate, and the residue of their property represented by shares of stock is taxed to the individual shareholders the same as other personal property. The assessment is to be of no greater proportion to face value than is the assessment of other personal property. Shares of stock of banks located without the State owned by residents are not subject to taxation.

TAXATION OF CREDITS.—In making up the credits which any person is required to list he is entitled to deduct from the gross

amount all *bona fide* debts owing by him except notes for insurance premiums and unpaid subscriptions to societies or to the capital stock of any corporation. As to county taxes and licenses, see statute.

Municipal Councils may by ordinance license all industries and occupations for which under the State law a license is required, and the amount must not exceed the sum required by the State law.

SHARES OF STOCK.—Shares of stock in domestic and foreign corporations are not taxed in hands of holder when the corporate property is taxed in the State. Bonds of both domestic and foreign companies are taxed to the holder.

INHERITANCE TAX.—There is a State inheritance tax of 5 per cent of the market value of property descending to any person or corporation except the parent, husband, wife, lawful issue, brother or sister or adopted child in which event the tax is 1 per cent provided that an estate valued at less than $7500 is not subject to any tax. 40 per cent of the inheritance tax goes to the county school fund. Real estate is not subject to the inheritance tax.

The statute is modeled after the New York statute of 1885 (State v. District Court, 41 Mont. 357), and taxes all property passing by will, or intestacy laws, within the jurisdiction of the State, whether owned by a resident or non-resident.

MORTGAGES.—Mortgages have not been exempted from taxation though such exemption is authorized by the constitutional amendment of 1916.

POLL TAXES.—Poll taxes are for county and municipal purposes only. There is no State poll tax, but there is a county poll tax of $2.00 for every male inhabitant over 21 and under 60 years of age, except paupers, insane persons and Indians not taxed. This tax is for the exclusive use of the poor fund in the county. There is also a road tax of $2.00 for every able-bodied man over 21 and under 50 years of age.

There is no income tax.

COLLECTION.—Taxes are collected by the county treasurer. They are delinquent on the 30th day of November and a penalty of 1 per cent is added to the amount. Taxes on real property are a lien against the property assessed, and the taxes on personal property are a lien upon the real property of the owner thereof. This lien attaches as of the first Monday in March in each year. The county

treasurer must collect the taxes on all personal property when such taxes are not in his opinion a lien upon real property sufficient to secure their payment. The delinquent tax list is published in some newspaper on or before the last Monday in each year and in not less than 21 and not more than 28 days after the first publication sale of the real estate is made subject to redemption within 36 months from date of sale. The purchase money draws interest at 1 per cent per month from the date the taxes become delinquent. The purchaser is entitled to a deed at the end of the 36 months but must give 30 days' notice to the owner or occupant of the property.

NEBRASKA

Art. IX, Sec. 1. The legislature shall levy a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, bankers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates.

Sec. 2. The property of the State, counties and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general laws. In the assessment of all real estate incumbered by public easement, any depreciation occasioned by such easement may be deducted in the valuation of such property. The legislature may provide that the increased value of lands, by reason of live fences, fruit and forest trees grown and cultivated thereon, shall not be taken into account in the assessment thereof.

Sec. 3. The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate for a period of not less than two years from such sales thereof; Provided, That occupants shall in all cases be served with personal notice before the time of redemption expires.

Sec. 4. The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for State purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever.

Sec. 6. The legislature may vest the corporate authorities of cities, towns, or villages with power to make local improvements by special

assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

ADMINISTRATION.—The administration machinery consists of a State Board of Equalization and Assessment, consisting first of the Governor and other elective public officials, which has general supervision over all taxation matters and has authority to equalize and change local assessments as a class by counties, and also to assess certain railroad and car company properties, fixes the amount and rate of the State tax, which cannot exceed five mills on the dollar. The County Board of Assessments deal with the individual local assessment; but an appeal from their decision goes to the district court, and not to the State Board. The county treasurer acts as tax collector, and the county assessor has general supervision and the assessments are made by the precinct assessors who are elected and assigned to the different districts by the county assessors, who have general supervision over them.

RAILROADS.—Railroads, whether foreign or domestic, pay locally a general property tax for State and local purposes, and also pay a capital stock tax based upon the par value of the subscribed stock levied upon all corporations (see *infra*). What may be termed the operative property of the railroads is assessed by the State Board and apportioned on the mileage basis to the counties. The local right of way and tangible terminal property located in cities and villages is assessed locally, but is subject to equalization by the State Board. (Cobbey's Statutes, Sections 10687 and 10697.) This is said to have been for the purpose of giving municipalities a more adequate return for the protection of the valuable railroad property therein than could be afforded under the usual rule of apportionment.

PUBLIC UTILITY COMPANIES.—These companies, that is, telegraph, telephone and pipe line companies, whether domestic or foreign, pay a general property tax assessed and collected locally for State and local purposes, the gross receipts of the companies being considered under the statute in arriving at the intangible or franchise rights. These companies pay also a graduated property stock tax. The real estate of this class of corporations is assessed in the same manner as that of individuals. Other public utility companies, such as street railway, water, electric, gas and lighting companies, are taxed in the same

manner. Express companies under the act of 1913 pay an annual occupation tax to the State equal to 2 per cent upon its gross earnings within the State.

CAR COMPANIES.—Domestic and foreign car and freight line companies pay the general property tax and also the graduated capital stock tax. Parlor and sleeping car companies are assessed on that proportion of the value of their cars operated in the State during the year that it bears to the entire main track mileage covered by such cars. The same rule is applied in the assessment of freight line companies. These car assessments are apportioned by the State Board among the several counties according to mileage, and then reapportioned by the county clerks to the cities and villages.

BUSINESS CORPORATIONS.—The same rule is applied in the assessment of these companies locally under the general property tax for State and local taxation under the general property tax. In the assessment of merchants, whether corporate or not, the assessor may inspect the books and insurance policies to determine the value of the stock on hand. (See Cobbey's Statutes, Sec. 10956.)

CAPITAL STOCK TAX.—Every domestic and foreign corporation for profit, except banks, insurance and building and loan corporations, pays an annual tax on capital stock, termed an occupation permit. Where the stock has a par value of $10,000 or less, the tax is $5 and the maximum is $200 where the capital stock is $2,000,000 or over. This tax is paid by all corporations, including the railroads and public utilities as stated. Foreign corporations of the various classes are taxed in practically the same manner as similar domestic corporations. Shares of stock in corporations whose property is taxed in Nebraska is not taxed to the holders. Stocks in other corporations and bonds of foreign and domestic corporations are in theory taxed to the resident holder. (Cobbey's Statutes, Sec. 10920.)

INSURANCE COMPANIES.—Domestic fire insurance companies are taxed upon their gross receipts, and foreign life, accident and surety companies pay an annual tax of 2 per cent on their gross receipts.

BANKS.—Banks and investment companies are assessed on their tangible personal and real property. The individual shareholders are assessed according to the value of their shares on any amount over and above the value of the property assessed against the bank. The banks are compelled to pay both taxes and have a lien on the stock to secure reimbursement.

POLL TAXES.—There is no State poll tax, but all male citizens of cities between 5,000 and 25,000 inhabitants between 21 and 50 years of age pay annually a labor tax of $3 for the repair of the streets, or in lieu thereof, perform two days' labor.

INHERITANCE TAX.—The graduated inheritance tax applies to all property passing by will or by intestate laws or by transfer made in contemplation of death, which in the case of father, mother, husband, wife or lineal descendant is subject to a tax of one dollar on every one hundred dollars of clear market value in excess of $10,000, this rate increasing with the different degrees of inheritance and in amount so that it is six dollars on every one hundred dollars on an estate of $50,000, all estates valued at less than $500 being exempt. The tax is a lien on the property for five years and interest is charged at 7 per cent from the date of accrual until paid unless paid within a year of such time. This tax is paid to the County Treasurer for the use of the State and is expended under the direction of the County Board of each county for the purpose of the improvement of the country roads.

The tax applies not only to all property passing by will or intestacy from a resident, but also, if the decedent was not a resident, where the property, or any part thereof, or any interest therein is within the State.

LICENSE TAXES.—Business taxes and licenses other than the State corporation taxes, are levied by the counties and municipalities. By act of 1913, companies loaning money at more than 10 per cent interest are to pay an annual license fee of $100.

EXEMPTIONS.—Exemptions, in addition to public property, are agricultural and horticultural societies, property held for religious, cemetery and charitable purposes, the increased value of lands by reason of live fences and fruit and forest trees grown and cultivated thereon. Any depreciation in value of property caused by public easements is deducted from the assessed valuation.

ASSESSMENTS.—The assessment of all classes of property is upon 20 per cent of the actual value, which is defined as the value in the market in the ordinary course of trade. (See Cobbey's Statutes, Sec. 10911.) Real estate is assessed quadrennially and taxpayers are not required to give a list of the real estate holdings. But improvements made after the regular assessment are assessed in the year of their

construction, and losses by fire or otherwise are deducted. Personalty is assessed annually. Improvements on realty and the realty are separately assessed. The property and assessment and equalization are the same for county and municipal taxation as for the State.

COLLECTION.—Taxes are assessed against real property on the first day of October and become a lien thereon. Personal property is assessed on the first day of November, and the assessment is a lien thereon. Personal taxes unpaid by December 1st are delinquent and may be collected by distress and sale, or by civil action, on February 1st. Real taxes are delinquent on May 1st and draw interest at the rate of 10 per cent thereafter. Lands sold for taxes may be redeemed within two years from the date of sale upon payment of the taxes together with 15 per cent interest and subsequent taxes. Tax sales are not invalidated by irregularities. When real estate is sold for taxes, the purchaser receives a certificate for such sale and within five years may foreclose such certificate as a lien upon the land in the same manner as mortgages are foreclosed, and demand a deed therefor, and unless that certificate is foreclosed within five years, it ceases to be a valid lien upon said property.

NEVADA

(Constitution, Amended 1906.)

Sec. 1. The legislature shall provide by law for a uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, when not patented, the proceeds alone of which shall be assessed and taxed, and when patented, each patented mine shall be assessed at not less than five hundred dollars ($500), except when one hundred dollars ($100) in labor has been actually performed on such patented mine during the year, in addition to the tax upon the net proceeds, and, also excepting such property as may be exempted by law for municipal, educational, literary, scientific, or other charitable purposes.

ADMINISTRATION.—A new tax commission law was enacted by the legislature of 1917 (see Acts of 1917) which is composed of the Governor as chairman, one member of the Railroad Commission, five appointees by the Governor from the State at large, "one to be a live-stock man, one a land man, one a banker, one a mining man, and one a business man." This commission has a general supervision of the assessment and collection of all taxes in the State, assess the

property of all companies engaged in interstate commerce, and for that purpose to make a physical valuation of the property of all companies engaged in interstate commerce. It is made the duty of the county assessors, county commissioners and the officers of municipalities to report assessment rolls to the tax commission, and to furnish such other data and information as the tax commission shall demand.

The State Board of Examiners must prepare and file with the tax commission a detailed budget estimate of the aggregate amount of money necessary to be raised by taxation and from other sources of revenue to maintain the government of the State on a cash basis for the current fiscal year. It is the duty of every board of county commissioners sitting as a budget commission to report its estimate of the amount of money necessary to conduct county business, and to report the same to the State Tax Commission. The State Tax Commission sits with the county assessors annually as a Board of Equalization. An appeal to the courts of the State lies from any decision of the State Tax Commission, but no citizen can appeal to the courts for redress from an assessment until he has first complained to, and obtained action from, the State Commission. The Commission is required to ascertain the net income of all mining property in the State for the purposes of taxation.

RAILROADS.—The assessment of railroad property for the general property tax is made on the mileage basis and apportioned according to the various counties, except in any event that any portion of the rolling stock or the personal property of a railroad company operated wholly within the State shall not be used in all the counties, that such railroad runs, then such portion of such rolling stock or personal property shall be assessed only in the counties where used or employed.

CORPORATIONS.—All corporations are subject to the general property tax as are individuals, and there is also a license fee for corporations of 10 cents on each thousand dollars of the total amount of the capital stock, the minimum fee being $25.00. Public service corporations pay a franchise tax of 2 per cent on the net profits to the county treasurer wherever located to the benefit of the school fund of such county.

FOREIGN CORPORATIONS.—Foreign corporations admitted to do business in the State pay the same license fee as domestic corporations, but are subject to retaliatory provisions if the laws of the State from which they come discriminate against Nevada corporations.

INHERITANCE TAX.—There is a graduated inheritance tax, the rates being graded according to the amount involved and the degree of inheritance, an exemption of $20,000 being allowed in the case of the widow or minor child and this amount being reduced according to the degree of inheritance. 20 per cent of this tax is paid to the general fund of the county, 40 per cent to the State school fund, and 40 per cent to the general fund of the State.

This tax is imposed upon the transfer of any and all property within the jurisdiction of the State and any interest therein, whether belonging to the inhabitants of the State or not, or whether tangible or intangible. The ownership of stock in a corporation owning property in the State, is considered as the ownership of a proportionate interest in the property so owned by the corporation.

MINES.—Mining property not patented, is not taxed, unless it is producing. Mining companies pay locally the general property tax on net proceeds of mines and surface improvements. (See Laws, 1912, Secs. 3687, 3688.)

Royalties are taxable to the lessor. Patented mining claims upon which less than $500 has been expended, are subject to a minimum annual assessment of $500. (Laws of 1913, ch. 13, Sec. 1.) Quarterly reports are required of mining companies.

POLL TAXES.—Each male resident of the State over 21 and under 60 years of age, uncivilized American Indians excepted, and not by law exempt is required to pay an annual poll tax of $3.00 for the maintenance and betterment of public roads, the entire revenue going to the county for the maintenance of the road districts in the county.

EXEMPTIONS.—Exemptions other than public property and unpatented mines and mining claims as above, property used for religious worship, property of masons, odd fellows and similar charitable organizations or benevolent societies up to $5000, public free cemeteries, property up to $1000 of widows and orphans, who are residents of the State, the property of Y. M. C. A., including buildings, furniture and equipment.

PATENTED LANDS.—Patented lands and lands held under any State land contract are assessed for not less than $1.25 per acre.

MORTGAGES.—A mortgage or other obligation given to secure a debt is treated for assessment as an interest in the property affected, except as to railroads and other *quasi* public corporations. The property affected by such mortgage less the value of such security is

assessed to the owner of the property and the value of the security is assessed to the owner thereof in the county where the property is situated.

BANKS.—Banks are taxed on their real estate and the shares of stock less the value of the real estate and the shares of stock less the value of the real estate are assessed to the owners, the bank paying the tax on the shares of stock.

LICENSES.—For annual licenses by the State and also by the counties to different corporations, whether individual or corporate, see the statute.

ASSESSMENTS.—Under Act of March 13, 1903, the assessors of the several counties meet at the Capitol and establish a valuation throughout the State of all railroads, rolling stock, telegraph and telephone companies, electric light and power lines, also livestock and other kinds of property which can be valued and assessed to advantage by the assessors acting collectively.

COLLECTION.—A lien for taxes assessed against property attaches on the first Monday of March of each year. Taxes are collected by suit instituted by the county attorney, and may be commenced at any time after the taxes become delinquent. Such suits are instituted only when the delinquent taxes and costs exceed the sum of $300. If less than $300, the property may be sold by the county treasurer after notice. Sales of real estate are subject to redemption within six months from the date of sale on payment of costs and interest at the rate of 3 per cent per month from the date of sale to the date of redemption. Taxes are levied by the county commissioners on the first Monday in March.

Taxes are payable between the first Monday of October and the first Monday in December, at which time they become delinquent, and a penalty of 10 per cent is added after the delinquency.

Personal taxes constitute a lien against the real property of a taxpayer. When a taxpayer has no real estate, then distraint may be made against personal property.

NEW HAMPSHIRE

(Constitution.)

"Full power and authority are hereby given and granted to said general court . . . to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and

residents within, the said State, and upon all estates within the same.

"The public charges of government, or any part thereof, may be raised by taxation upon polls, estates and other classes of property, including franchises and the transfer or succession of property by will or inheritance; and there shall be a valuation of the estates within the State taken once in every five years at least, and as much oftener as the general court shall order."

As to construction of constitutional requirement of equality of taxation, see Opinion of Justices, 79 Atl. Rep. 31.

ADMINISTRATION.—A State Tax Commission of three members, appointed by the Supreme Court, assesses the property of railroads, telegraph, telephone, express and car companies. Local assessments are made by the selectmen of the towns.

POLL TAX.—The State levy of general property taxes is apportioned to the towns and paid by them in the same manner as their own revenue. The poll tax constitutes a part of this tax; and in the "invoice," as it is termed, all poll taxes are assessed at 50 cents and taxable property at 50 cents on each $100 of its appraised value. The polls included are all males over twenty-one years of age not specifically exempt. Those not included are soldiers and sailors of the Civil War and, at the discretion of the selectmen, soldiers and sailors who served in the Spanish-American War, and also paupers and insane persons.

RAILROADS.—The railroads and also the other public utilities are assessed by the State Tax Commission upon the actual value of the property; and the companies pay the State a tax rate thereon as nearly equal as may be to the average rate on other property throughout the State (excepting property specially taxed). This valuation is assessed one-half to the towns in which the railroad is located in which each town receives its proportion according to the share of the capital expended in each town for buildings and right of way; second, to each town in which any stock is held, such proportion of the remainder as the number of shares owned therein bears to the whole number of shares; third, the remainder for the use of the State. The expenses of the Public Service Commission are paid by the levy of a tax on the gross receipts of the railroads.

BANKS.—All shares of stock in banks, except savings banks, building and loan associations, are assessed to the owners in the towns

where they reside at the value shown by the capital, surplus and undivided profits after deducting real estate.

CORPORATIONS.—Corporations in general are taxed under the General Property Tax. Savings banks and similar corporations pay an excise tax based on the amount of the saving deposit, with specified deductions. Building and loan associations pay a tax of three-fourths of 1 per cent upon their capital stock. Domestic fire insurance companies are taxed annually 1 per cent on the amount of their paid-up capital. Fire insurance companies pay a tax of 2 per cent on gross premiums, and foreign life insurance companies a tax of 2 per cent on gross premiums, less payments to residents for death loss suits during the year.

INHERITANCE TAX.—The inheritance tax is for the benefit of the State only. A 5 per cent inheritance tax, collectible by the State Treasurer, is imposed on all property, real and personal, of inhabitants of the State, and on all real property of non-residents of the State. The only exemption is in the case of a child or children, not including an adopted child. The statute also applies to property granted before the death, to take effect on the death of the grantor. Taxes are assessed April 1st of each year, and are payable December 1st, becoming delinquent January 1st.

EXEMPTIONS.—Houses of worship and parsonages up to $2500, school houses, property to the amount of $1000 of any soldier or sailor who served sixty days in the Civil War and was honorably discharged, and the wife or widow of the same, provided the aggregate value of the property is not over $3000, improvements caused by reclaiming swamp or swale land for ten years; new manufacturing establishments for ten years, by vote of the town; undeveloped mines, unless belonging to other than those to whom the real estate is taxed; all public stocks and bonds, material used in ship building, money loaned to a town by a citizen at a rate of interest not exceeding 5 per cent, by a vote of the town, and not ten years in use; money loaned at a rate of interest, not exceeding 5 per cent, secured by real estate in the State, also live stock of certain ages, to a limited extent, are exempt. A city or town may exempt any future issue of its bonds owned or held by its own citizens. (See also Laws of 1911.)

ABATEMENTS.—Abatements for ten years of 90 per cent are allowed to land owners planting timber trees for the next ten years; 80 per cent for the next ten years; and for the third ten years, 50

per cent. Selectmen may also make reasonable deductions from the estates of the insane when the income from the estates is not sufficient to support them. A sum not exceeding three dollars is allowed from the tax of any citizens who shall construct and maintain a watering trough for horses; also a reasonable deduction for planting and protecting shade trees by the highway for the use of wide-tired wagons.

COLLECTIONS.—All taxes are a lien upon the real estate from the date of their assessment. Owners of property are required to make oath as to the amount of property they own subject to taxation, with the value thereof, and return the same to the selectmen of the town on or before the 15th day of April.

All taxes, State and local, except those on railroads, etc., are collected by the town collector. The collector may distrain on goods and chattels, and, if necessary, take the body. The lien for taxes on real estate attaches as of July 1st after assessment. Interest at 10 per cent is charged on all taxes not paid on or before October 15th. Deeds are given after public auction within one year of sale of property for non-payment of taxes, provided the land has not been redeemed by the payment of taxes, cost of sale, and 12 per cent interest thereon from the time of sale to the date when offer to redeem is given.

NEW JERSEY

(Constitution as amended in 1875.)

Art. IV, Sec. 7, Par. 12. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.

ADMINISTRATION.—The powers of the Board of Equalization of taxes and the State Board of Assessors were consolidated by Act of April 13, 1915, Chap. C. 244, in a State Board of Taxes and Assessments consisting of five members, at least one of them to be a counselor-at-law, and not more than three of the same political party, appointed by the Governor and confirmed by the Senate. There is a substantial separation of sources of State and local taxation, the State deriving its revenue from license taxes and the like, the only State tax being collected and refunded to the towns for school purposes.

The State Board of Assessors, composed of four members appointed by the Governor, constitutes the Board of Assessment for certain classes of railroad and canal property and for certain classes of corporations taxed on gross earnings for local purposes.

County boards of equalization are organized to assist the State Board in the equalization of property.

RAILROADS.—The local property of railroads is assessed by the local assessors as other property. The operating property and franchises of railroads, and such property as rolling stock, are assessed by the State Board of Assessors; and the rate of taxation levied on this property is the average rate of taxation on all property assessed for local purposes by the local assessors.

POLL TAX.—There is a poll tax of $1.00 upon every mail inhabitant of the age of 21 years and upwards except paupers, idiots and insane persons and certain exemptions of those in public service. The poll tax is not applied to State revenues.

EXEMPTIONS.—The exemptions from general taxation include public property and also the bonds of the State, and any city or county in the State, and the personal property owned by citizens and corporations of the State situated and being out of the State, upon which taxes shall have been actually assessed and paid within twelve months before May 20th, the date for commencing the assessment. The property of national guards, all property used for educational and charitable purposes and not conducted for profit, and all cemeteries; members of the national guard are exempt to a valuation not exceeding $500. The exemptions include dwelling houses connected with a college or school for the accommodation of the professors or other officers.

MORTGAGES.—Mortgages secured by property in the State are not listed for taxation, and no deduction from the assessed value of real property is made on account of any mortgage debt, but the mortgagor is entitled to credit on the interest payable on the mortgage for so much of the tax as is equal to the tax rate applied to the amount due on the mortgage, except where the parties have otherwise agreed, or where the mortgage is an investment of funds not subject to taxation, or where the parties have lawfully agreed that no deduction shall be made from the taxable value of the land by reason of the mortgage.

DEDUCTION OF DEBTS.—Provision is made for the deduction of debts from the valuation of personal property owing to creditors in the State, but by a later act (see 1914 C. 191) no deduction for debt is allowed from the assessed value of specific goods or chattels.

CORPORATIONS.—Corporations of the State are regarded as residents and inhabitants of the taxing district where their chief office is located, and foreign corporations are assessed and taxed in respect

to the business done by them in the State, and for the amount of capital usually employed in the State in the doing of such business.

RETALIATION.—Whenever taxes, fines, penalties or other obligations are imposed by the laws of any State or corporations of New Jersey, the same obligations are imposed on corporations of that State doing business in New Jersey. (Laws of 1894, Chap. 228.)

LICENSES.—A State tax is imposed by way of license upon certain corporations; and telegraph, telephone, cable, electric light companies, express, gas and palace car and sleeping car companies, oil or pipe line companies and insurance companies pay a percentage on their gross incomes. All other companies incorporated under the laws of the State pay a license fee of one-tenth of 1 per cent on the amount of the capital stock up to $3,000,000; on all sums between $3,000,000 and $5,000,000 one-twentieth of 1 per cent, and a further sum of $50.00 per million, or any part thereof, on all amounts in excess of $5,000,000. The act does not apply to railway, canal or banking companies or savings banks, cemeteries or religious corporations or purely charitable or educational associations or manufacturing or mining corporations, at least 50 per cent of whose capital stock issued and outstanding is invested in mining and manufacturing carried on in the State.

All corporations using or occupying the public streets are made subject to the franchise tax of 2 per cent upon their gross receipts in lieu of all other franchise tax.

BANKS.—Banks are taxed upon the basis of capital, surplus and undivided profits less the assessed value of the bank's real estate.

INHERITANCE.—There is an inheritance tax (see Laws of 1909, ch. 228) upon the transfer of any property, real or personal, of the value of $500 or over. Property to the amount of $5000 passing to a father, mother, husband, wife, child or lawful lineal descendant, brother or sister, or the wife of a son, or husband of a daughter is exempt. Also certain religious and charitable institutions. The rates are graduated according to the degree of relationship. (Inquiry should be made in any case to the Comptroller of the State, Trenton, New Jersey.)

The transfer of property in this State of a non-resident decedent is made subject to the tax; and the tax shall then bear the same ratio to the entire tax which the said estate would have been subject to under the act, if such non-resident decedent had been a resident of this State, and all property, real and personal, had been located within the State, as such taxable property within the State bears to the entire estate wherever situated.

The tax applies when the transfer is of property by a resident and of tangible property in the State when the decedent was a non-resident at the time of his death.

COLLECTION.—Property is assessed as of May 20th, and taxes are payable on or before December 20th, draw interest from 7 to 12 per cent, and are collected by sale of goods or arrest of the person, but no arrest for taxes on real estate.

Timber may be sold for taxes on unimproved land, and taxes are a lien from December 20th and after September 1st following; land may be sold in term or in fee with the right of redemption in the owner or the mortgagee for two years, and until the right of redemption is cut off by 60 days' notice served or mailed, but possession for 20 years bars redemption.

NEW MEXICO

(Constitution as amended by the people Nov. 3, 1914.)

TAXATION AND REVENUE

Sec. 1. Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class.

Sec. 2. Taxes levied upon real or personal property for State revenue shall not exceed four mills annually on each dollar of the assessed valuation thereof except for the support of the educational, penal and charitable institutions of the State, payment of the State debt and interest thereon; and the total annual tax levy upon such property for all State purposes exclusive of necessary levies for the State debt shall not exceed ten mills.

Sec. 3. The property of the United States, the State and all counties, towns, cities and school districts, and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit, and all bonds of the State of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation.

Sec. 4. (Regulates deposit of public money and forbids private profit therein.)

Sec. 5. The legislature may exempt from taxation property of each head of a family to the amount of two hundred dollars.

Sec. 6. Lands held in large tracts shall not be assessed for taxation at any lower value per acre than lands of the same character or quality and similarly situated, held in smaller tracts. The plowing of land shall not be considered as adding value thereto for the purpose of taxation.

Sec. 7. No execution shall issue upon any judgment rendered against the Board of County Commissioners of any county, or against any incorporated city, town or village, school district or board of education; or against any officer of any county, incorporated city, town or village, school district or board of education, upon any judgment recovered against him in his official capacity and for which the county, incorporated city, town or village, school district or board of education, is liable, but the same shall be paid out of the proceeds of a tax levy as other liabilities of counties, incorporated cities, towns or villages, school districts or boards of education, and when so collected shall be paid by the County Treasurer to the judgment creditor.

ADMINISTRATION.—A State Tax Commission was created in 1915, composed of five members each, to be a representative of some industry, and not more than three of them to be of the same political party. The commission determines the value of property of railroads and public service corporations, and banks, and certifies its value to the assessor of the county where the property is situated. The valuations of the commission are final. It also determines and certifies the actual value of live stock. It is made its duty to determine the actual value of the property subject to taxation in each county.

The State Board of Equalization, created by the Constitution, consists of the Governor and other State officials, and has the powers, until otherwise provided, vested in the territorial board of equalization.

RAILROADS.—Railroads and car companies are assessed as other corporations under the General Property Tax by the State Board, and the valuation apportioned to the counties where the property is located on a mileage basis.

PUBLIC UTILITIES.—Telegraph, telephone and other public utility companies are assessed in the same manner by the board. Express companies, however, are taxed by the State on their gross earnings on business done in the State at 2 per cent in addition to the valuation of their tangible property.

INSURANCE.—Insurance companies are taxed 2 per cent on gross receipts received, less return premium.

BANKS.—Stock in national and State banks is assessed where bank is located by State Board of Equalization and tax is paid by the bank. Real estate of banks is assessed by local assessors as other real estate and deducted from valuation of stock.

POLL TAX.—A poll tax of $1.00 upon all able-bodied men over the age of 21 years is levied for school purposes. There is also a county road tax of $3.00 commuted by labor on the public roads for three days. There is also a poll tax of $1.00 in the counties commuted by labor.

EXEMPTIONS.—Exemptions in addition to public property, include bonds of the State and of any counties, municipality and district therein; the property of literary, scientific, benevolent, agricultural, and religious institutions and societies; family homesteads or other property to the value of $200; mines and mining claims bearing gold, silver or other precious metals (but not the net product and surface improvements) for a period of ten years from the date of location; irrigating ditches, canals and flumes belonging to cemeteries and used on a mutual basis, and all other ditches, etc., for irrigating purposes for a period of six years after completion; property of irrigating districts, tanning factories for six years, and railroads for six years after the completion of the road and branches. No tax is to be levied on any mining claim located under the laws of the United States or upon any shaft or work therein until after a patent has been issued by the United States and for one year thereafter; but other net improvements and the net profit are taxable. Bona fide debts may be deducted from credits in the assessment.

LICENSES.—A number of licenses or corporation taxes provided for by statute are required to be paid direct to the County Treasurer to be used for school and general county purposes and are treated as county revenues. There is a like list of such taxes upon occupations, for which see the statute.

One half of the State tax upon car companies is apportioned to the counties according to mileage and one-half of the gross receipts of express companies is distributed to the counties according to business done therein. One-half of the tax on corporations provided for by statute is paid into the general current expense fund of the county and one-half into a county school fund.

MINES.—Mines and mining claims are exempt from taxation for ten years from date of location (Comp. Laws Sec. 1560-1756); but the net product and surface improvements are subject to the general property tax.

TAX LEVIES.—Under the Act of 1915, the tax commission provision is made for the assessment of property at its actual value and the maximum rate of taxation levied for State purposes was limited to

three mills on the dollar, to county purposes five mills and city and town purposes three mills on the dollar. Special school levies are authorized not to exceed five mills. The commission is authorized to increase or decrease the valuation of any county so as to bring it to the actual value fixed by the commission.

COLLECTIONS.—Taxes are assessed as of the first day of March and return is made on or before the first Monday in April. One-half of the taxes become due on the first day of August and delinquent on the first day of December. The other one-half become due on the first day of January following, and are delinquent on the first day of June. Real estate sold for taxes is redeemable within three years with interest at 1½ per cent on the purchase money and payment of taxes by the purchaser.

NEW YORK

(Constitution.)

The Constitution contains no direct restriction upon the exercise of the legislative power in taxation, that is, in imposing taxes or in granting exemptions from taxation.

The legislature, however, is prohibited from passing private or local bills granting to any person or corporation exemption from taxation (Art. III, Sec. 24), and every law imposing a tax must state the purpose for which it is to be applied. (Art. X, Sec. 3.)

GENERAL SYSTEM.—The General Property Tax has not been enforced as the main source of local revenues since 1880. Special taxes have been imposed on particular subjects, usually for State purposes, and at the present time, 1917, there is an assortment of such special taxes imposing rates which have been established at various times during this period. The General Property Tax upon the real and personal property of the State subject to these specific exemptions and special taxes, is levied upon the assessments made in the counties and cities of the State.

ADMINISTRATION.—The State Tax Commission, with three appointed members, has general power of administration and recommendation, and its members sit with the Commissioners of the Land Office and thus constitute the State Board of Equalization, with power to equalize aggregate assessments of real estate in each county with the average equalized assessed values of real estate in all counties, for the purpose of levying a direct State tax when required.

The State Tax Commission by recent amendment has a limited

power over local assessments through the possibility of securing, by application to the court, a reassessment of property in any taxing district.

The local assessment of real property and of all such personal property as is subject to the General Property Tax, is made up by a Board of Assessors, which in a town consists of three members and in cities and incorporated authorities of a varying number. The assessments in the towns and cities are subject to equalization, as between towns by the County Board of Supervisors. This board consists of a supervisor representing each town; and in the city, each ward. The members have no function with respect to the assessment of property except to equalize for the purpose of county tax.

PUBLIC UTILITY CORPORATIONS.—Transfer and transmission corporations, including railroads, are required to pay an annual franchise tax for State purposes, based upon the capital stock employed within the State at a rate varying according to the amount of dividend declared. These corporations are also required to pay an additional franchise tax based upon their earnings within the State at the rate of one-half of one per cent.

Other public utilities corporations above are taxed upon their gross earnings within the State and upon dividends declared in excess of a minimum amount.

CORPORATE FRANCHISE TAXES.—There is a corporate franchise tax levied upon domestic corporations, of one-twentieth of one per cent on amount of capital stock, and upon foreign corporations one-eighth of one per cent for the privilege of doing business in a corporate capacity in the State. The franchise tax on corporations whose shares have no designated value, is on the basis of such portion of the net assets of the corporation as its gross assets employed in any business within the State bear to its entire gross assets wherever employed in business. It seems, however, that under the Act of 1917, corporations, whether foreign or domestic, engaged in manufacturing and mercantile business, are exempted from this annual tax by paying the income tax therein provided. See *infra*, Business Corporations.

BANKS.—The shares of State and national banks are taxed for local purposes to the shareholders in the taxing district where the bank is located, at the rate of one per cent of the capital surplus and undivided profits. The proportionate amount of assessed value of real estate is deducted from valuation of shares.

Trust companies are taxed as such for State purposes the same as banks. The shareholders are not otherwise taxed.

(See *supra*, Secs. 300-302 as to judicial construction of this system in reference to national banks.)

Savings banks are taxed for State purposes at the rate of one per cent of their surplus and undivided earnings, and their deposits are not taxable in the hands of their depositors.

Investment companies organized under the Banking Act pay a franchise tax of 1½ mills for every dollar face value of their capital, plus one per cent of their surplus and undivided profits. Certificates of investment of such companies are exempted. See subdivision 14 of Sec. 4 of Tax Law as amended in 1917.

INSURANCE COMPANIES.—Are taxed at three per cent of their gross earnings within the State for State purposes.

BUSINESS CORPORATIONS.—In 1917 (see Chapter 726, Laws of 1917) the law was enacted providing for the taxation of manufacturing and mercantile corporations for State and local purposes, based on an apportionment to the State of their net income, as shown in the reports for the Federal Income Tax. In the same year cities were authorized to provide for a tax for local purposes upon transient retail merchants, based upon gross sales at the local tax rate. The mercantile and manufacturing companies are taxable on such proportion of their net income as is earned in the State at the rate of 3 per cent, two-thirds of the yield going to the State and one-third to the locality. The tax applies to both domestic and foreign corporations, also to joint stock associations. It does not apply to public service corporations. If the company does business both within and without the State, the taxable net income will be determined in proportion to the business within the State to the total business wherever located.

Companies paying this tax are exempted from State franchise tax, and personal property tax, and State tax on capital stock. Reports for this tax must be filed before July 1st.

INVESTMENT TAX.—Under the investment tax law, as enacted in 1917, a tax of two mills on each $100 face value for not over five years, or 1 per cent on each $100 for a term of five years, is imposed for State purposes; and on payment of this tax and the stamping of the security, the property is exempted for such term from the general property tax, except it is not exempted from the stock, transfer and inheritance taxes. Parties engaged in the business of buying and selling such securities, may deduct indebtedness from securities carried

in their business, that are not held for longer than eight months; otherwise there is no deduction for debts allowed in the payment of this tax. If the tax is not paid before the assessment day, the property will be subject to the general tax at the residence of the owner, at the local rate and without the benefit of debt deduction. A further penalty is provided by which, if securities are found in decedent's estate upon which tax has not been paid, an additional inheritance tax of 5 per cent is imposed. Provision is made for an apportionment of value of an investment secured by mortgage on property situated partly within and partly without the State, so that the tax may be paid upon that portion not represented by property within the State. Investment tax must be paid before assessment day to obtain exemption for property tax.

MORTGAGE TAX.—Under the mortgage recording tax law there is a recording tax of fifty cents for each mortgage, up to $100; and above that, fifty cents for each $100 and remaining major fraction thereof of principal debt, which under any contingency may be secured by a mortgage on real property situated within the State; and on such payment, the mortgage is thereafter exempted from other taxation to the extent that it represents real property situated in the State.

Mortgages for indefinite amounts are taxable on value of property secured thereby. A mortgage on real property is defined as including any mortgage which creates a lien upon, or a lien over, or affects the title to real property, even though personal or other property may be acquired as part of the security. One-half of the yield of this tax goes to the State, and one-half to the locality.

STOCK TRANSFER.—By the stock transfer tax all sales of stock are subject to a tax of two cents on each share of $100, and a transfer of the stock without such payment is a misdemeanor.

INHERITANCE TAX.—What is elsewhere known as an inheritance tax is known in New York as a transfer tax; and it is imposed upon inheritances of more than $500, and on more than $5000 when the estate passes to father or mother, husband, wife, child, adopted child, or any lineal descendant, the rates being graded according to the degree of inheritance.

Bequests for religious, benevolent and educational purposes and for religious observances, or to a municipal corporation for a specific public purpose, are exempted.

The term "resident" is defined so as to include persons who have dwelt or lodged in the State, whether for the greater part of any

period of twelve consecutive months in the twenty-four months next preceding death, and also to include those who by formal written instrument, executed within one year prior to death, declared themselves residents of the State.

TAXATION OF NON-RESIDENTS.—The property subject to assessment includes the personal property of non-residents situated within the State, except negotiable securities deposited as collateral, or money deposited by, or debts owing to non-residents.

The capital invested in business by non-residents is taxable to the same extent as that owned by a resident. The practical enforcement, however, of this tax against a non-resident, is said to be limited to household furniture.

The capital of non-residents employed in business in the State, is made taxable. Where the deceased is a resident, the tax is imposed upon personal property within the State only and upon all intangible property, wherever located or kept; and, in case of non-resident, the tax is imposed upon tangible personal property located within the State, but not upon intangible personal property, with certain specified exceptions.

EXEMPTIONS.—The legislative power in exempting from taxation is not limited by the Constitution. Exemptions include not only public property and bonds of the State, or any civil division thereof, but also historical and art buildings, property owned by and exclusively used for corporations organized for religious, educational, charitable and benevolent purposes, and large and varied classes of property, including property bought by pension money by Civil War veterans and owned by him, or his widow, or bought by a clergyman, or his widow (when resident of the State) to the value of $1500; also vessels engaged in foreign commerce, bank deposits and cemeteries. The total of the exempted real estate, other than public property, was said, in 1915, to amount to one-fifth of the total assessed value of real estate. (See State Tax Bulletin of 1916.)

ASSESSMENTS.—Sec. 6, Art. I of the Tax Law, Chapter 60 of the Consolidated Laws, provides that all real and personal property shall be assessed "at full value thereof." Assessments may be reviewed by court under writ of certiorari. Parties are entitled to deduct from their total assesment of personal property the full amount of their indebtedness. All real property within the State and all personal property situated or owned in the State, is taxable

unless specially exempted from taxation by law. Assessment day in New York City is October 1st, and in towns, July 1st.

COLLECTION.—Taxes on personal property are enforced by sale of the debtor's personal chattels by action on short notice. When taxes on real property are not paid for one year from the first of February following the day on which the tax is due, the property is forced for sale by the State Comptroller, the purchaser at such sale receiving a certificate; and, if no previous redemption, the purchaser is entitled to a deed after the expiration of one year. Lands may be redeemed within one year from date of sale on payment of the amount paid by purchaser with 10 per cent interest. This applies to towns; but cities usually have special charter provisions regulating the collection of real estate taxes.

The City of New York has a unique method of selling its lien for unpaid taxes to the private purchasers who bid the lowest rate of interest. The buyer may enforce payment by foreclosure in the same manner as that in which a mortgage is foreclosed; but he must hold this lien for three years if the owner of the land pays interest on the rate bid.

Provision is made for the refunding of taxes paid on erroneous or illegal assessments. (See Tax Law, Chapter 62, Laws 1909, constituting Chapter 60 of the Consolidated Laws.)

NORTH CAROLINA

Sec. 17. (Declaratio nof Rights.) No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by law of the land.

Art. V, Sec. 1. The General Assembly shall levy a capitation tax on every male inhabitant in the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax shall never exceed two dollars on the head.

Sec. 2. (Provides for capitation tax on every male inhabitant over twenty-one and under fifty years of age, equal to the tax on property valued at $300 in cash, the State and county capitation tax not to exceed two dollars on the head, the proceeds to be devoted to education and the poor, only 25 per cent to go to the latter in any one year.

Sec. 3. Laws shall be passed for taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and, also, all real and personal property, according to its true

value in money. The General Assembly shall also tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which it is derived is taxed.

Sec. 5. (Public property is exempted, and the General Assembly is empowered to exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers, libraries and scientific instruments, or any other personal property, to a value not exceeding $300.)

Sec. 6. (County taxes are not to exceed double the State taxes, except for special purposes and with the special approval of the General Assembly.)

Sec. 7. Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

ADMINISTRATION.—The State Tax Commission, formerly known as the State Corporation Commission, assesses the property of public service corporations, the corporate excess and domestic business corporations, and the capital stock tax on both domestic and foreign corporations, and has general supervision of the administration of the tax laws of the State, with powers of investigation and recommendation. The Board of County Commissioners appoints the local list takers or assessors.

RAILROADS, STEAMBOAT AND CANAL COMPANIES.—Domestic and foreign railroads, steamboat and canal companies pay to the State for general purposes, and locally for local purposes, a general property tax on all property, including intangible or franchise values. In addition railroads pay to the State for State purposes a mileage tax as a privilege or license tax; and steamboat and canal companies pay the capital stock tax. The assessment of railroad property by the State Board is made by determining the aggregate value of the main track mileage in the State as apportioned to the whole main track mileage. The value of the property locally assessed is deducted, and the remainder is then apportioned to counties and municipalities where the mileage lies. The locally assessed property is not apportioned. Steamboat and canal companies are assessed in the same manner as far as applicable.

Telegraph, telephone, car and express companies pay the general property tax on all property, including franchise value; and telephone companies also pay a gross receipt tax, express companies a mileage tax, and car companies a capital stock tax. See laws of 1913, ch. 201.

STREET RAILWAY AND OTHER PUBLIC UTILITIES.—These companies pay the general property tax on all property, including franchise value, to the State for State purposes, and locally for local purposes; and in addition they pay to the State for State purposes the capital stock tax. (Laws of 1913, ch. 203, Sec. 57.)

BUSINESS CORPORATIONS.—Domestic business corporations pay to the State for State purposes, and locally for local purposes, the general property tax on real and personal property. Foreign business corporations pay locally the general property tax on real and personal property in the same manner as individuals. In addition, both domestic and foreign business corporations pay to the State for State purposes the capital stock tax of 1/25 of 1 per cent (but the tax not to be less than $7.50). (Laws of 1913, ch. 201, Secs. 76, 82.)

TAX ON CORPORATE EXCESS.—An exceptional feature of the tax system of North Carolina, is the tax of "corporate excess" of domestic, manufacturing, mercantile and miscellaneous corporations by the State Tax Commission for the purpose of local assessment. The commission deducts the value of real and personal property as assessed locally, and certifies the remainder or "corporate" excess to the county where the corporation has its principal office or place of business. The result is to tax domestic business corporations on the entire value of their capital stock.

BANK STOCKS.—Bank stocks are assessed on the value of the capital stock and surplus and undivided profits, less the assessed value of real and personal property listed for taxation. An allowance of not exceeding 5 per cent of bills receivable, is authorized to cover insolvent debts.

INCOME TAX.—There is an income tax of 1 per cent on gross incomes over $1250. In obedience to the State Constitution, this income tax is from property not taxed, that is, salaries, annuities, trades and professions; and the proceeds are paid to the State.

INHERITANCE TAX.—An inheritance tax is levied on the property passing by will or intestacy, that is, on the property located in the State of the decedent, whether domiciled or not within the State, and also, if the deceased was a non-resident, on any part of such property within the State, widows being entitled to exemption of $10,000 and each child to an exemption of $5000, and the rates being graduated according to relationship and amount. There is an exemption of this tax on legacies to religious, educational, or charitable institutions in

the State, and the tax applies to all legacies of property passing by will or intestacy since March 12, 1913. (See Act of 1915.)

POLL TAX.—There is a poll tax on each taxable person from 21 to 50 years of age, applied to education, support of the government, pensions and schools. There is also a county poll tax, but the State and county combined are not to exceed two dollars per capita. Municipalities may also levy a tax on polls for State purposes, not to exceed two dollars.

LICENSES.—There is an extensive system of licenses for the privilege of carrying on business; and where a specific license is levied by the State, the counties may levy the same tax, and no more, and municipalities may also tax such privileges not to exceed twenty-five dollars.

EXEMPTIONS.—Property held for religious purposes, including ministers' residences, educational purposes, property belonging to the Y. M. C. A. and similar associations, property of Indians not citizens, except lands held by purchase, wearing apparel, private libraries, kitchen and household furniture not exceeding in value $25.00, are exempt. All the tax exemptions to corporations are repealed, except as to property held for religious, charitable, educational, literary and benevolent purposes and cemeteries.

No city or municipality can impose on property a greater tax than 1 per cent, except by special authority of the General Assembly.

COLLECTIONS.—Taxes are collected by the sheriffs of the counties. Taxes are a lien on real estate from the time the lists are given, as on the 1st day of May. Lands may be sold for taxes after notice published once a week for four weeks. The delinquent may redeem within a year by paying the amount bid by the purchaser and all other taxes on the land and 20 per cent per annum.

NORTH DAKOTA

Constitution of 1890, Art. XI, Sec. 175. (To the same effect as Iowa Const., Art. VII, Sec. 7.)

Sec. 177. All improvements on land shall be assessed in the manner prescribed by law, but plowing shall not be considered as an improvement or add to the value of land for the purpose of assessment.

Sec. 178. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State or any county or other municipal corporation shall be a party.

Sec. 180. (Authorizes a poll tax.)

"Constitutional Provisions: Secs. 176 and 179 as amended November 3, 1914:

"Sec. 176. Taxes shall be uniform upon the same class of property, including franchises, within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only, but the property of the United States, and of the State, county and municipal corporations, shall be exempt from taxation; and the Legislative Assembly shall by a general law exempt from taxation property used exclusively for school, religious, cemetery, charitable, or other public purposes, and personal property to any amount not exceeding in value two hundred dollars for each individual liable to taxation: Provided, That all taxes and exemptions in force when this amendment is adopted shall remain in force, in the same manner and to the same extent, until otherwise provided by statute.

"Sec. 179. All taxable property, except as hereinafter in this section provided, shall be assessed in the county, city, township, village or district in which it is situated, in the manner prescribed by law. The property, including franchises of all railroads operated in this State, and of all express companies, freight line companies, dining-car companies, sleeping-car companies, car equipment companies, or private car line companies, telegraph or telephone companies operating in this State and used directly or indirectly in the carrying of persons, property, or messages, shall be assessed by the State Board of Equalization in a manner prescribed by such State board or commission as may be provided by law. But should any railroad allow any portion of its railway to be used for any purpose other than the operation of a railroad thereon such portion of its roadway, while so used, shall be assessed in the manner provided for the assessment of other real property."

ADMINISTRATION.—The State Board of Equalization is composed of the Governor, State Auditor, State Treasurer, Attorney-General and the Commissioner of Agriculture and Labor, and equalizes assessments between the several counties of the State, and may not reduce the aggregate valuation more than 1 per cent. It also levies the State tax not to exceed 4 mills on the dollar on the amount necessary to meet the appropriation of the General Legislative Assembly in the estimated general expenses of the State.

A special tax of one-half of 1 per cent is levied for the "State Wolf Bounty Fund" and a tax of one mill may be levied for the purpose of maintaining certain State educational institutions.

By the Laws of 1911 (see ch. 303), a tax commission was created, three members appointed by the Governor, to exercise general supervision of the administration over the tax laws of the State and over the assessors, Boards of Review and Boards of Equalization; and it is empowered to assess all light, heat and power companies doing busi-

ness in the State. The powers of the commission were substantially enlarged by Act of 1917.

The County Board of Review and Equalization is composed of a County Board of Commissioners. It equalizes the work of the local assessors.

There is but one assessment for State, county and city purposes.

RAILROADS.—The State Board of Equalization assesses the value of the franchise, roadway, roadbed, rails and rolling stock of all railroads, and also the property and franchise of other public carriers.

CORPORATIONS.—Corporations are in general assessed as individuals, except railways, including street railways and certain other public service corporations, which are assessed by the State Board of Equalization.

BANKS.—Banks are taxed on real estate and the assessed value is deducted from assessed value of shares, but are not allowed to deduct for such real estate from value of shares assessed to stockholders more than sixty per cent of par value of shares and surplus, and only can deduct for land located in the State.

POLL TAX.—There is no State poll tax, but there is a county and city poll tax for the support of the common schools and for roads. The latter may be paid in labor as well as in money.

INHERITANCE TAX.—The Inheritance Tax Law of 1913 applies to property, transferred by will or under intestate laws, of any deceased resident, and also when such transfer is from a non-resident and the property is within the jurisdiction of the State, whether the ownership of, or interest in such property be evidenced by certificates of stock or bonds in domestic or foreign corporations. It also applies when transfers are made in contemplation of death. The law exempts property without the State subject to inheritance tax in the State where located, provided such State has a similar exemption for property located in North Dakota belonging to a resident of such State.

The tax rates are graded according to the degree of relationship and amount of inheritance. There is an exemption up to $20,000 in the case of husband and wife, and $10,000 in case of father and mother, lineal descendant, adopted child or lineal descendant of adopted child. There is no tax when the transfer is for charity. Important changes were made by Act of 1917, making a normal rate for estates not exceeding $25,000 in value, and a graduated additional rate upon all the amount of estates exceeding $25,000. The exemptions are reduced.

EXEMPTIONS.—Exempted property includes property held for educational and religious purposes, the money and credits of each such institution, and the personal property of each individual to the amount of $50.00. Property of organizations and agricultural fair associations not conducted for profit also exempted.

CLASSIFICATION.—Important changes were made in the tax system in 1917, under the constitutional amendment of 1914, authorizing classification. Money and credits other than that of incorporated banks or otherwise exempted, were subjected to an annual tax of three mills on each dollar of their fair cash value, and exempted from other taxation. Parties failing to make return to the assessor are subject to a penalty of 50 per cent. The proceeds of this taxation were apportioned one-sixth to the State, one-sixth to the county revenue, one-third to the city, village, or town, and one-third to the school district wherein the property was assessed.

Property is classified for taxation as follows:

Class 1. All land, town and city lots, railroad property and bank stocks are valued and assessed at 30 per cent of their true value.

Class 2. Live stock, agricultural and other tools and machinery, automobiles and other vehicles, boats and water crafts, flour mills, store buildings, stocks and merchandise, electric and gas plants, water works systems, improvements upon town and city lots are valued and assessed at 20 per cent of their true value.

Class 3. Household goods, house equipment and wearing apparel, farm improvements, stocks other than banks, and money and credits not otherwise assessed are valued and assessed at 5 per cent of their true value.

ASSESSMENT.—The property included and the methods of assessment and of equalization are the same for all county, township, city and school taxes as for the State.

By Act of 1917, all personal property is listed and assessed every year, according to value, on the first day of April; while real property is listed every odd numbered year, according to its value, on the first day of April preceding the assessment.

COLLECTIONS.—All taxes become due on the 1st day of December, and delinquent on the 1st day of March, after which date the penalty of 5 per cent attaches to both real and personal taxes, and on the 1st day of June following, an additional penalty of 2 per cent, and on the 1st day of November a third penalty of 3 per cent on the original taxes against the real estate is charged. After the 1st day of March

interest at the rate of 1 per cent per month on the original amount taxed on personal property is charged until the tax is paid. The collection of personal taxes is enforced by distress and sale of such property. They become a lien upon the property at the time the assessment is made. Taxes on real property are made a perpetual lien upon the property assessed, and the collection is enforced by sale.

All real estate is sold for non-payment of taxes on the first Tuesday of December of each year. Redemption from tax sale may be made within three years, with interest at the rate bid by the purchaser and a penalty of 5 per cent, together with all subsequent taxes that may have been paid by the purchaser up to the time of redemption. All taxes as between vendor and purchaser become a lien upon real property on and after the 1st of December of each year.

OHIO

(Constitution.)

Art. II, Sec. 1. (The restraint upon the legislative power by the reservation of the initiative and referendum under the amendment of 1912 is qualified as follows:)

Sec. 1e. The powers defined herein as the "initiative" and "referendum" shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property. (Adopted September 3, 1912.)

Art. XII, Sec. 1. No poll tax shall ever be levied in this State, or service required, which may be commuted in money or other thing of value. (As amended September 3, 1912.)

Sec. 2. Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, excepting all bonds at present outstanding of the State of Ohio or of any city, village, hamlet, county or township in this State or which have been issued in behalf of the public schools in Ohio and the means of instruction in connection therewith, which bonds so at present outstanding shall be exempt from taxation; but burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value five hundred dollars, for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; and the value of all property, so exempted, shall, from time to time, be ascertained and published as may be directed by law. (As amended September 3, 1912.)

Sec. 3. The General Assembly shall provide, by law, for taxing the notes and bills discounted or purchased, moneys loaned and all other property, effects, or dues, of every description (without deduction) of all banks, now existing, or hereafter created, and of all bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals.

Sec. 4. The General Assembly shall provide for raising revenue sufficient to defray the expenses of the State for each year, and also a sufficient sum to pay the interest on the State debt.

Sec. 5. No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

Sec. 6. Except as otherwise provided in this Constitution the State shall never contract any debt for purposes of internal improvement. (As amended September 3, 1912.)

Sec. 7. Laws may be passed providing for the taxation of the right to receive, or to succeed to, estates, and such taxation may be uniform or it may be so graduated as to tax at a higher rate the right to receive, or to succeed to, estates of larger value than to estates of smaller value. Such tax may also be levied at different rates upon collateral and direct inheritance, and a portion of each estate not exceeding twenty thousand dollars may be exempt from such taxation. (Adopted September 3, 1912.)

Sec. 8. Laws may be passed providing for the taxation of incomes, and such taxation may be either uniform or graduated, and may be to such incomes as may be designated by law; but a part of each annual income not exceeding three thousand dollars may be exempt from such taxation. (Adopted September 3, 1912.)

Sec. 9. Not less than 50 per centum of the income and inheritance taxes that may be collected by the State shall be returned to the city, village or township in which said income and inheritance tax originate. (Adopted September 3, 1912.)

Sec. 10. Laws may be passed providing for excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas and other minerals. (Adopted September 3, 1912.)

Sec. 11. No bonded indebtedness of the State, or any political subdivision thereof, shall be incurred or renewed unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity. (Adopted September 3, 1912.)

Art. XIII, Sec. 4. The property of corporations, now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals.

Sec. 6. The General Assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.

ADMINISTRATION.—The Tax Commission of Ohio is composed of three commissioners, not more than two of the same political party, who are in continuous session during business hours excepting Sundays and legal holidays, and all sessions are open to the public. The commission has comprehensive powers of supervision over the county boards of review and the local assessors.

The State Board also hears appeals from county boards, equalizes county assessments of classes of property, and may order a reassessment of any class. Special excise taxes upon corporations are also assessed by the Tax Commission, with whom the annual reports of such companies are filed. A distinct feature of the tax system of the State is the limitation of a tax rate both State and local by what is known as the maximum rate law. (See report of State Tax Commission, 1911-12.)

RAILROADS.—Corporations are taxed like individuals upon their real and personal property, but in addition are assessed through the State Tax Commission a special tax as follows: Railroad companies 4 per cent on the gross receipts of such companies for business done within the State for the year next preceding the 30th day of June of each year.

PUBLIC UTILITIES.—Sleeping car, freight line and equipment companies and carriers not otherwise listed for taxation 1 2/10 per cent of the value of the proportion of the capital stock of such companies representing by property owned or used in Ohio; express and telegraph companies 2 per cent of the gross earnings of such companies for business done within the State for the year next preceding the first day of May in each year, electric light companies, gas, waterworks, telephone, union depot 1 2/10 per cent of the gross receipts of such companies for business done within the State for the year next preceding the first day of May of each year, street, suburban and interurban railroad companies 1 2/10 per cent of the gross receipts of such companies for business done within the State for the year next preceding the first day of May of each year, pipe line companies 4 per cent of the gross receipts of such companies for business done with the State for the year next preceding the first day of May in each year.

(The railroad tax in this classification of gross earnings was sustained by Supreme Court of U. S. See *supra*, Sec. 254.)

FOREIGN INSURANCE.—Foreign insurance companies pay 2½ per cent on the gross amount of premiums received from policies

covering risks within the State, the term "gross premiums" being specifically defined in the case of mutual companies.

BANKS.—The assessment of the shares of incorporated banks is made by the valuation at true value in money (real estate being deducted), and this valuation is equalized by the State Commission, so that such shares "shall be assessed equally and uniformly throughout the State at the true value in money."

CORPORATIONS.—Corporations other than public utilities, both domestic and foreign, pay an annual excise tax of 3/20 of 1 per cent upon its subscribed and outstanding capital stock. In the case of foreign companies this tax is levied upon that proportion of the authorized capital stock represented by the property owned and used in the State. This does not apply to insurance corporations, fraternal and beneficiary associations or building and loan associations required by law to report to the superintendent of insurance, nor does this general corporation tax apply to the public utility corporations upon which the specific excise taxes above named are levied.

ASSESSMENTS.—For statutory definition of "taxable personal property" see Sec. 5399, Compiled Tax Laws of Ohio, 1916; of "domicile" see Sec. 5373; of "credits" see Sec. 5370.

Assessments of real estate are made quadrennially, but an assessment may be made by order of Tax Commission in any district at any time. Personal property is assessed annually.

MERCHANTS.—Merchants are taxed upon their general average value of stock of merchandise during previous year (prior to April 1st) as personal property, and manufacturers in same manner upon their average value of all raw material or product.

EXEMPTIONS.—The exemptions include bonds of the State and municipalities of the State which were outstanding at the time of the adoption of the Constitution of 1912. Exemptions also include prehistoric earth works or historic buildings, the property of the Grand Army, Masons, lodges, and also of the Indiana Meeting of Friends or the religious society known as the Grand Baptists or Dunkers in the State where the income was exclusively used for the support of the poor of the denomination. $100 is exempted to each individual. (See also Constitution, *supra*, Art. XII, Sec. 2.)

INHERITANCE TAX.—A collateral inheritance tax of 5 per cent is levied upon all inheritances or transfers to take effect after death

when made to other than the parent, husband or wife, brother and sister, nephew, niece and adopted children or lineal descendant where in excess of the value of $200. Bequests to certain charities and public institutions within the State of Ohio are exempt.

The tax applies to all the property so transferred within the jurisdiction of the State and any interest therein, whether belonging to an inhabitant of the State or not, and whether tangible or intangible.

COLLECTIONS.—Taxes on real estate become a lien on second Monday of April, and are payable to the County Treasurer between October 1st and December 20th of each year, the owner having the option of paying the full amount on or before December 20th or one-half then and the remainder between April 1st and June 20th following. A penalty of 15 per cent is added to the semi-annual installment. Property is advertised by the County Treasurer if the tax for the previous year and one-half of the current year's tax is not paid before December 20th, and advertised for sale on the third Tuesday of January following, and then sold for the taxes and penalties. Redemption may be made by the owner by payment of the taxes, penalty of 15 per cent with interest if reedeemed within one year and 25 per cent if redeemed after first year. In default of such redemption the purchaser at such tax sale is entitled to a deed. The State may foreclose its lien for taxes by plenary proceeding in court. Returns are made for special excise taxes by railroads on or before the first day of October in each year by sleeping car, freight line and equipment companies between the 1st and 31st days of May, by domestic corporations for profit during the month of May in each year, and by foreign corporations during the month of July.

The collection of personal taxes may be enforced by distraint or personal action.

OKLAHOMA

(Constitution Adopted in 1907.)

(Art. X, Secs. 1 to 4 provides that the fiscal year shall commence on the first day of July unless otherwise provided by law. The legislature shall provide by law for an annual tax sufficient with other resources to defray the estimated ordinary expenses; and for the purpose of paying a State debt, the legislature shall provide a tax sufficient to pay the annual interest and the principal within twenty-five years.)

Sec. 5. The power of taxation shall never be surrendered, suspended, or contracted away. The taxes shall be uniform upon the same class of subjects.

Sec. 6. All property used for free public libraries, free museums, public cemeteries, property used exclusively for schools, colleges and

all property used exclusively for religious and charitable purposes, and all property of the United States and of this State, and counties and municipalities of this State, household goods of the heads of families, tools, implements and live stock employed in support of the family, not exceeding $100 in value, and all growing crops shall be exempt from taxation: provided that all property not herein specified, now exempt from taxation under the laws of the Territory of Oklahoma, shall be exempt from taxation unless otherwise provided by law; and provided further taxation all ex-Union and ex-Confederate soldiers bona fide residents of this State, and all widows of ex-Union and ex-Confederate soldiers who are heads of families and bona fide residents of this State, and personal property not exceeding $200 in value shall be exempt.

(Exemption is also made of property of specified institutions for orphan children and all fraternal orphan homes, together with all their charitable funds and property exempted by treaty, stipulation between the Indians and the Federal Government.)

The legislature may authorize any incorporated city or town, by a majority vote of its electors voting thereon, to exempt manufacturing establishments and public utilities from municipal taxation, for a period not exceeding five years, as an inducement for their location.

Sec. 7. The legislature may authorize county and municipal corporations to levy and collect assessments for local improvements on property benefited thereby, homesteads included, without regard to cash value.

Sec. 8. All property which may be taxed ad valorem, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and any officer or other person authorized to assess values or subjects for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of malfeasance; and upon conviction thereof, shall forfeit his office and be otherwise punished as provided by law.

Sec. 9. Rates for all purposes, State and local, not to exceed in any one year 31½ mills on the dollar, apportioned to State, county and school purposes, provision being made for the increase of the school rate by popular vote of the locality.

Sec. 10. Provision is made for increase of the tax rate for erecting of public buildings by popular vote.

Sec. 11. The receiving by any public officer of any profit from public monies, made an offense, punishable also by a disqualification to hold office.

Sec. 12. The legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes.

Sec. 13. The State may select its subjects of taxation, and levy and

collect its revenues independent of the counties, cities or other municipal subdivisions.

Sec. 14. Taxes shall be levied and collected by general laws, and for public purposes only, except that taxes may be levied when necessary to carry into effect Sec. 31 of the Bill of Rights. Except as required by the Enabling Act, the State shall not assume the debt of any county, municipal corporation or political subdivision of the State, unless such debt shall have been contracted to defend itself in time of war, to repel invasion, or to suppress insurrection.

Sec. 15. The credit of the State shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the State; nor shall the State become an owner or stockholder in, nor make donation by gift, subscription to stock, by tax or otherwise, to any company, association, or corporation.

Sec. 16. All laws authorizing the borrowing of money by and on behalf of the State, county, or other political subdivision of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for no other purpose.

Sec. 17. The legislature shall not authorize any county or subdivision thereof, city, town, or incorporated district, to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or levy any tax, or to loan its credit to any corporation, association, or individual.

Sec. 18. The legislature may authorize the levy and collection of a poll tax on all electors of this State, under sixty years of age, not exceeding two dollars per capita, per annum, and may provide a penalty for the non-payment thereof.

Sec. 19. Every act enacted by the legislature and every ordinance and resolution passed by any county, city, town, or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose.

Sec. 20. The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes.

Sec. 21. There shall be a State Board of Equalization consisting of the Governor, State Auditor, State Treasurer, Secretary of State, Attorney-General, State Inspector and Examiner, and President of the Board of Agriculture. The duty of said board shall be to adjust and equalize the valuation of real and personal property of the several counties in the State, and it shall perform such other duties as may be prescribed by law, and they shall assess all railroad and public service corporation property.

Sec. 22. Nothing in this Constitution shall be held, or construed, to prevent the classification of property for purposes of taxation; and the valuation of different classes by different means or methods.

ADMINISTRATION.—The powers of the State Board of Equalization are set forth in the Constitution, Sec. 21.

The County Board of Equalization is composed of the County Commissions of which the assessor is the secretary. The general property tax applies to all property both of corporations and individuals and is supplemented with respect to certain classes of corporations by gross receipt and license taxes.

RAILROADS.—Railroads are assessed upon all their operating property under the general property tax by the State Board. Street railway and interurban car companies are assessed and taxed in practically the same manner.

PUBLIC UTILITY COMPANIES.—Sleeping car companies, express companies, telegraph and telephone companies and other public utility companies pay locally the general property tax for the State and local purposes, and in addition are subject to tax on gross receipts. This tax in case of an interstate express company was adjudged invalid as being in effect a tax on property in addition to an ad valorem tax on the property and therefore an interference with interstate commerce. (Meyer v. Wells Fargo & Co., 223 U. S. 297, Sec. 254, *supra.*)

CORPORATIONS.—Property of corporations is taxed as that of individuals under the general property tax. The cost of filing articles of incorporation for business companies is one-tenth of 1 per cent of the authorized capital stock, but not in any case less than $3.00. Corporations except public service, oil, natural gas and mining corporations pay to the State for State purposes an annual license fee of fifty cents upon each $1000 of authorized capital stock and for foreign corporations $1.00 upon each $1000 of capital stock employed in business in the State. (Revised Laws, Secs. 7538 to 7549.) The registration fee paid for incorporation or upon entering the State to do business is in lieu of this tax for the first fiscal year. (Revised Laws, Sec. 7540.)

BANKS.—National bank stock is assessed to holders at place where bank is located at its par value on February 1st. The bank pays the tax for its shareholders. Tangible property of the banks is assessed as other property and deducted from valuation of shares.

Private banks are assessed upon their property where business is carried on.

EXEMPTIONS.—In addition to the property named as exempt in the Constitution, there is also exempt all property of scientific, educational and benevolent institutions and the property of students in such institutions used solely for the purpose of their education. Oil wells

on lands upon which final proof has not been made, family portraits, food and fuel not to exceed provisions for one year, and all grain and forage necessary to maintain for one year the live stock used for the support of the family; all pensions from the United States or from any of the States until paid into the hands of the pensioner; the notes and mortgages of building and loan associations, given upon real estate located in the State, personal property used in the operation and development of waters known as "underflow water" are exempted for a period of five years; and any incorporated city or town may likewise exempt, by ordinance, from municipal taxation, such property in order to encourage and induce the development of gravity of underflow water plants.

GRADUATED LAND TAX.—A graduated land tax is levied on land of taxable value in excess of 640 acres of average taxable value, which pay an annual tax on the average value of excess at rates graduated according to the amount of the excess fixed by the statute. For the purpose of this tax, land in Oklahoma is assumed to have an average value of $20.00 per acre. Three hundred and twenty acres of land is exempt from this tax, regardless of the value of the land, and the taxation is in addition to the regular ad valorem tax. There is also a tax imposed on persons holding land under lease or contract less than fee simple in excess of 340 acres.

INHERITANCE TAX.—There is a graduated inheritance tax depending upon the degree of relationship of the inheritor to the decedent. This tax is collected according to rules and regulations promulgated by the State Auditor. The tax is imposed when the transfer is of tangible property in the State made by any person, or of intangible property made by a resident of the State at the time of transfer. Tangible property includes many forms of indebtedness, including bonds and shares of stock in domestic and foreign corporations.

THE INCOME TAX.—An income tax is levied upon any income, salaries, fees, trades, professions, or property upon which a gross receipt or excess tax has not been paid. The tax is three-fourths of 1 per cent on the first $10,000 of taxable income; 1½ on the next $15,000, and 2 per cent on all above that.

POLL TAX.—Every male person aged between twenty-one and fifty years, having resided in the State for thirty days, who is not a public charge, and who has not performed road duty, is subject to road duty for four days of eight hours each year. He may furnish a satisfactory substitue, or he may become exempt by paying $1.25 for each day so

exempted. Cities have power to impose a poll tax of not exceeding $1 on all able-bodied males over twenty-one and under fifty.

ASSESSMENTS.—The property included and the method of assessment and equalization are the same for municipal as for State and county taxes. As the total rate is limited to 31½ mills, and the State may levy 3½ mills, and the county 8 mills, the local rates are restricted to 20 mills, plus any portion of the State or county limits not used.

LICENSES.—There is an extended system of business taxes, licenses and fees.

MORTGAGES.—There is a registration tax on mortgages, under Act of 1913 on all mortgages recorded on and after July 1st, 1913; and the record owner of any mortgage may elect to pay this registration tax of fifty cents for each $100 and for each remaining fraction over $100 when the mortgage is for five years or more, and thirty cents for each $100 when the mortgage is for less than five and not more than three years; and twenty cents when it is less than three years. This tax is in lieu of the general property tax.

COLLECTIONS.—The assessment refers to the first day of January and is to be completed and report transmitted to the State Board of Equalization not later than the Saturday before the third Monday in June.

Taxes on real property are a perpetual lien on such property and taxes on personal property constitute a lien for two years on all real property in the county in which such tax for personal property is levied. Taxes on personal property may constitute a lien in any county in the State provided such taxes are certified to the county in which said real estate is situated.

County Commissioners may contract with any person to assist the proper officers in the discovery of property not listed or assessed, and may fix the compensation of such person not over 15 per cent of the taxes recovered.

One-half of all taxes levied upon an ad valorem bases becomes due on the first day of November; and if not paid on the first day of January, the entire tax levy becomes delinquent. If the first half is paid by the first day of December, the second half becomes delinquent on the 15th day of June thereafter. All delinquent taxes, as a penalty, bear interest at the rate of 18 per cent per annum. The County Treasurer is required to notify each taxpayer of the amount of his taxes and when the same become due and delinquent.

OREGON

Art. I, Sec. 32. *Taxes and Duties.*—No tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be equal and uniform.

Art. IV, Sec. 23. *Special and Local Laws for Collection and Assessment of Taxes, Prohibited.*—The Legislative Assembly shall not pass special or local laws in any of the following enumerated cases, that is to say:

* * * * * * * * * * *

10. For the assessment and collection of taxes for State, county, township, or road purposes.

Art. IX, Sec. 1. *Assessment and Taxation.*—The Legislative Assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law.

Sec. 1a. No poll or head tax shall be levied or collected in Oregon. The Legislative Assembly shall not declare an emergency in any act regulating taxation or exemption.

Sec. 3. *No Tax Levied, Except in Compliance With Law, Etc.*—No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

Sec. 6. *Deficiency, When and How Levied For.*—Whenever the expenses of any fiscal year shall exceed the income, the Legislative Assembly shall provide for levying a tax for the ensuing fiscal year, sufficient with other sources of income, to pay the deficiency, as well as the estimated expense of the ensuing fiscal year.

(Amendment of 1916.)

Sec. 1 (b) of Art. IX. All ships and vessels of fifty tons or more capacity engaged in either passenger or freight coasting or foreign trade, whose home ports of registration are in the State of Oregon, shall be and are hereby exempted from all taxes of every kind whatsoever, excepting taxes for State purposes, until the first day of January, 1935.

Art. XI, Sec. 11. (The specific authorization of a majority of legal voters was made necessary for either the State, county, municipality or district to levy a tax for a greater amount of revenue other than the payment of bonded indebtedness or interest thereon than the like amount for the year previous plus 6 per cent, provision being made for the case of new counties or municipalities being created and for determining the amount of the prior revenue in such cases. The prohibition against the creation of debts by counties prescribed in Section 10 of Article XI of the Constitution was made to apply to debts hereafter created in the performance of any duties or obligations imposed upon counties by the Constitution and laws of the State, and

any indebtedness created by any county in violation of such prohibition, and any levy of taxes made therefor was prohibited and was made void.)

Amendment submitted on June 4, 1917, was adopted, authorizing classification and for the control by the General Assembly and the people through initiative of rules of assessment and taxation.

ADMINISTRATION.—The Board of State Tax Commissioners is composed of the Governor, Secretary of State and State Treasurer and two appointed commissioners, and assesses all public service and public utility corporations. It has general supervision of the system of taxation and collection of taxes with power to equalize assessments as between counties but not as between individuals. County commissioners value and assess all property other than that assessed by the State Board of Tax Commissioners at its fair cash value. The County Board of Equalization hears appeals and adjusts and equalizes taxes. This is composed of the County Judge, County Clerk and County Assessor. Appeals of individual assessments may be taken from this board to the Circuit Court of the county.

RAILROADS AND PUBLIC UTILITIES.—The operating property of railroads is assessed by the State Board at a valuation apportioned to the tax district upon the basis of mileage. Express, telegraph and telephone companies are taxed in addition one-half of 1 per cent upon their gross receipts. Railroads also pay the corporation license tax. (See Licenses, *infra.*)

INSURANCE COMPANIES.—Foreign insurance companies, including surety companies, are taxed 2 per cent upon the total gross premiums for one year. The amount of the gross premiums is deducted from the total losses paid within the State. The payment of this 2 per cent is in lieu of all taxes on personal property of the corporation and its capital stock, and each company is compelled to report its gross earnings for State taxation on or before the first day of March of each year.

CORPORATIONS.—Real estate of corporations is assessed in the county in which it is located. The personal property of corporations is assessed where the principal office of the corporation is located. Railroad and boat companies are assessed at their principal terminals. The method of enforcing corporate taxes is the same as that for enforcing the collection of individual taxes.

EXEMPTIONS.—Property exempt from taxation includes real and personal property held for public use, personal property of literary, benevolent and scientific institutions, incorporated within the State, property of Indians who have not severed tribal relations, personal property of all persons who by reason of age, infirmity or poverty in the opinion of the assessor, are unable to contribute to the public charges, and also furniture and domestic fixtures actually in use in dwellings, and wearing apparel and jewelry and personal effects actually in use. Horses and accoutrements of national guardsmen are also exempt from execution or sale for debt for the payment of taxes. All land used for public roads. Shares of capital stock of national banks not located in Oregon are exempt from taxation.

BANKS.—The shares of the stock of national banks are assessed to the individual shareholders at the place where the bank is located. Stockholders of all banks are assessed and taxed on the value of their shares of stock in such banks.

The value of real estate assessed against the banks is deducted.

LICENSES.—Domestic corporations pay an annual license fee in accordance with the value of their capital stock. Certain exemptions are made for corporations solely engaged in mining and which have a limited output. These corporations are taxed a uniform fee of $10 annually, regardless of the amount of their capital stock. Every foreign corporation must pay a license fee annually of $100, except insurance companies of all kinds.

There is no poll tax. All laws regulating taxation or exemption are subject to review by popular vote on referendum.

INHERITANCE TAX.—The inheritance tax extends to all property within the jurisdiction of the State, whether belonging to the inhabitants thereof or not, both tangible and intangible. Property passing to benevolent, charitable or educational institutions within the State is exempt. The rate varies according to the degree of relationship and the amount in the case of estates of the first class, including ancestors, descendants, parents, brother and sister. The estates valued at less than $10,000 are exempt and the tax is levied on the excess over $5,000.

In the next degree the limit is $5,000 as to the estate and the tax is levied on excess of $2,000 received by each. In all other cases the tax is at the rate of 3 per cent on all amounts received not exceeding $10,000, and over $10 and not exceeding $20,000 4 per cent; over $20,

and not exceeding $50,000 5 per cent, and on the whole of all amounts received over $50,000 6 per cent.

COLLECTIONS.—Property is assessed as of the first day of March of each year and all taxes legally levied in any year are payable before the first day of April following, and penalties are thereupon attached of 1 per cent if not paid before the first day of May, 2 per cent if not paid before the first day of June, 3 per cent if not paid before the first day of July, 4 per cent if not paid before the first day of August and 5 per cent if not paid before the first day of September. One-half of the taxes may be paid before the first day of April, in which event the penalties prescribed attach to the remaining one-half payable before the first of September. On taxes delinquent after the first of September there is a penalty of 10 per cent and interest at the rate of 12 per cent. After October 5th the tax collector is directed to proceed with the collection of taxes upon personal property with interest and penalties, and collects the same by distraint and sale.

The personal property of non-residents is assessed where found.

All taxes lawfully imposed, including taxes on personal property and those charged upon real property, become a lien upon real and personal property. After the expiration of three months after the taxes on real estate are delinquent, the sheriff has a right to issue certificates of delinquency which are assignable, and bear interest until redeemed at the rate of 12 per cent per annum, and these certificates may be foreclosed by plenary judicial action, due publication being made, which must be commenced within six years after the date of delinquency. Property may be redeemed by payment of 12 per cent interest at any time before the issuance of tax deed and suit for foreclosure. The form of the deed in foreclosure is prescribed by statute and is declared to pass a good title to the lands assessed. Where the county bids in the lands it may sell the same at public or private sale.

PENNSYLVANIA

Art. IX, Sec. 1. All taxes shall be uniform within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit and institutions of purely public charity.

Sec. 2. All laws exempting property from taxation, other than the property above enumerated, shall be void.

Sec. 178. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State or any county or other municipal corporation shall be a party.

Sec. 180. (Authorizes a poll tax.)

ADMINISTRATION.—The Auditor, State Treasurer and Secretary of State constitute a Board of Revenue Commissioners, with power to equalize the assessment and taxes for the use of the State among the several cities and counties in proportion to actual value. Any county may appeal as to the valuation of personal property and taxes due to the Court of Common Pleas of Dauphin county. The State Board also assesses taxes on the capital stock of corporations, on gross receipts of transportation and other public service utilities, on the stock of banks, on gross premiums of domestic insurance companies having capital stock, on the net earnings and income of brokers and private bankers, incorporated banks and savings institutions. Property not exempted is subject to assessment by local assessors, who are subject to the supervision of the Board of Revision, composed of County Commissioners. General assessments are made triennially. Corporate reports are made to the Auditor-General.

SEPARATION OF SOURCES OF TAXATION.—In Pennsylvania the burden of taxation for State purposes is substantially placed on corporations and insurance companies. Since 1887 there has been no State tax on real estate, but real estate is taxed for local purposes.

RAILROADS.—Railroads and car companies are subject to a capital stock tax. An annual tax of five mills on each dollar of the actual value of the capital stock, that is, assets less indebtedness employed in business within the State. Railroads are also subject to a tax of four mills on the dollar on the face value of their scrip and bonds and certificates of indebtedness, except on bonds not owned in Pennsylvania. This tax is in theory deducted by the company from the interest on the obligation and paid to the State. In practice, however, it is usually borne by the corporation.

Railroads and public utility corporations pay, in addition to the capital stock tax, a State tax of eight mills upon each dollar of gross receipts. This does not apply, however, to receipts derived from interstate transportation.

Railroads and public service corporations are exempt from local taxation on their operating property, but this exemption does not extend to local property in Philadelphia and Pittsburgh.

PUBLIC SERVICE CORPORATIONS.—These corporations are taxed on the same system as railroad companies, the tax being collected by the State for State purposes, and their property being exempted to the same extent as that of local companies from local taxation.

FOREIGN CORPORATIONS.—Foreign corporations other than insurance companies pay to the State Treasurer a bonus of one-third of one per cent upon the amount of capital actually employed within the State of Pennsylvania, and a like bonus upon each subsequent increase of capital so employed.

CORPORATIONS.—Manufacturing corporations pay no State tax on property actually used for manufacturing purposes in the State. Other corporations except banks, savings institutions, foreign insurance companies and distilling companies pay five mills on the dollar of appraised value of capital stock. All corporations, including manufacturing corporations, pay local taxes on real estate. All corporations are required to retain out of interest paid on their indebtedness, if held in the State, four mills on each dollar of such indebtedness and pay the same to the State. (See Foreign Held Bond case, *supra*, Sec. 456.)

FOREIGN CORPORATIONS.—Foreign corporations doing business in Pennsylvania are taxable like domestic corporations on so much of their capital as is invested in the State.

INSURANCE COMPANIES.—Domestic and foreign insurance companies pay eight mills upon each dollar of gross premiums.

BANKS.—State and national banks and savings institutions pay the State four mills on each dollar of the actual value of their stock, including the real estate separately assessed.

POLL TAXES.—There is no State poll tax, but in cities of the second and third classes, a tax of one dollar upon each resident may be levied in lieu of the former tax on trades and professions and occupations. In townships, the supervisors may levy a tax upon every one subject to taxation of one dollar, one-half at least to be paid in money and the balance in work.

EXEMPTIONS.—The property exempted from county taxation, mortgages, judgments and moneys owing upon articles of agreement for the sale of real estate, except those of corporations, are exempt from all taxation except for State purposes. Exemptions also include

property held for religious, educational or charitable uses, public libraries and art galleries, which are exempt from all taxation.

INHERITANCE TAX.—This tax applies to all inheritances of not less than $250, whether the decedent was domiciled within or without the State, as to property within the State; and all estate situated out of the State, when the decedent had his domicile within the State. The tax is 5 per cent where the inheritance is to any other than the father, mother, husband, wife or children and their lineal descendants. The tax is for the use of the State, and a discount of 5 per cent is allowed if the tax is paid within three months after the death of the decedent. But if it is not paid at the end of one year, interest is charged at the rate of 12 per cent per annum.

MORTGAGES.—Mortgages, choses in action and other securities are taxable for State purposes at the rate of four mills on each dollar. By Act of May 15, 1913, mortgages and securities were authorized to be taxed for county purposes, and in cities co-existent with counties, at the rate of four mills on the dollar. It is provided, however, that property taxable under this act should not be taxable for any other local or State purpose.

TAX ON COAL.—By Act of 1913, a tax of 2½ per cent was placed on the market value of each ton of anthracite coal produced in the State, which was distributed one-half to the State and one-half to the counties in which the coal was produced.

LICENSE FEES.—There is an extended system of State licenses on occupations applied to liquor dealers, auctioneers, brokers and others, and also a system of licenses authorized by the cities of the State.

COUNTY AND MUNICIPAL ASSESSMENTS.—The county assessment is made triennially between the second Monday of December and the 31st day of December and relates to the date first named. Timber lands are assessed separately from cleared lands. No deduction from the value of real estate is made for ground rent, dower or mortgage. In the various municipalities, the property included as exempt is the same as for county taxation. The cities of Philadelphia and Pittsburgh, however, are specially authorized to tax for local taxation on the property subject to county and municipal taxes. Three-fourths of the State tax on personal property is refunded to the counties where collected.

COLLECTIONS.—Counties are responsible for collection and settlement is to be computed with the State Treasurer by the second Monday of November, or in default thereof, 10 per cent penalty is added for taxes remaining unpaid. Local taxes are collected by the local tax collectors. On receipt of the tax duplicate, the collector gives notice and all persons who make payment within sixty days are entitled to a reduction of 5 per cent. Warrants for collection are in effect for two years. Collectors have power to levy by distress and sale of chattels, or if necessary, by arrest. Land may be sold for county and township taxes two years due. Taxes on "unseated" land, that is lands lacking either residents or cultivation, are to be paid within one year. All taxes, county or municipal, except in cities of the first and second classes, are a lien on the real estate from the day of the levy, and if recorded, for three years.

RHODE ISLAND

(The Constitution.)

Art. I, Sec. 2. . . .

"All laws shall be made for the good of the whole; and the burdens of the State ought to be fairly distributed among the different citizens."

"Art. IV, Sec. 15. The General Assembly shall from time to time, provide for making new valuations of property for the assessment of taxes in such manner as they deem best."

ADMINISTRATION.—The Board of State Tax Commissioners, consisting of three members, not all of the same party, has general charge of taxes paid to the State, and represents the State in any litigation where the validity of a tax statute or of any assessment is in question. (See Tax Laws of 1912 and subsequent amendments.) Hearings with respect to valuation are granted by the board, and from the board's decision appeal lies to the Superior Court at Providence.

BUSINESS CORPORATIONS.—Manufacturing, mercantile and miscellaneous corporations doing business for profit in the State pay an annual tax in addition to the tax on real estate and tangible personal property and upon the value of that portion of the intangible property called its "corporate excess." The Board of Tax Commissioners determines from the returns filed by the corporation and levies a tax at the rate of 40 cents on each $100 of the amount of the corporate excess.

BANKS.—Banks and trust companies are taxed at 40 cents on the $100 of the fair cash value, less the value of the real estate or bonds issued by the United States or of the State, this being the same rate as other moneyed capital in the hands of the individual citizens of the State.

RAILROAD AND PUBLIC SERVICE CORPORATIONS.—Public service corporations doing business for profit in the State are taxed on gross earnings at 1 per cent on operation within the State, which in the case of corporations also carrying on business outside of the State are apportioned upon the mileage basis to the State. This is in lieu of all other taxes on intangible personal property of the corporation, or on the corporation's securities in the hands of holders. (Laws of 1912, Ch. 769.) The same rule is applied in the case of telegraph and telephone companies and other public utilities, but the rate is 2 per cent in case of the two named, 3 per cent in case of express companies. This is in addition to the State and local tax on real and taxable personal property.

TOWNS.—The towns of the State pay the State a tax of 9 cents on each $100 on the ratable property of the town.

EXEMPTIONS.—The exemptions include not only public property and bonds of the United States or of the State, but also, among other things, the estate of any person who in the judgment of the taxing authority is "unable from infirmity or poverty to pay the tax," household property books and family stores to the sum of $300; and also the estates of persons and families of the president and professors for the time being of Brown University of not more than $10,000 for each such person or officer, of the person or family included.

INTANGIBLES.—The intangible personal property, including money on hand, money on interest or money on deposit, or securities, is taxable at the uniform rate of 40 cents for each $100.

DEDUCTIONS FOR DEBTS.—Money or credits is taxable only upon the surplus of such property over actual indebtedness. (Laws of 1912, Ch. 769, Sec. 39, Sub. 10.) Only residents of the State, individual and corporate, are entitled to this deduction.

TAX ON OYSTERS.—A tax equal to 10 per cent of the rental payable by the lessees of oyster grounds is paid by the lessee to the State Treasurer. (Laws of 1912, Ch. 769.)

INHERITANCE TAX.—An inheritance tax is imposed upon the net estate of every resident decedent, and upon the net estate of every

non-resident decedent consisting of real and tangible property located within the State at the rate of one-half of one per cent upon the excess value of each estate over $5000. (See Act of 1916.) In the case of a non-resident, such proportion of such exemption is allowed as the value of the real property located in Rhode Island or an interest within bears to the value of the estate wherever located.

COLLECTIONS.—All taxes assessed against any person in any town, for either personal or real estate, constitute a lien on his real estate therefor for two years, and if the estate be not aliened until collected. The real estate liable for taxes, or so much thereof as is necessary, may be sold by the collector at public auction after due publication of notice. The deed of any real estate sold for taxes vests in the purchaser subject to the right of redemption, and the recitals in the deed are *prima facie* evidence of the facts stated. Redemption may be made within one year after the sale on payment of the amount with 20 per cent in addition, or such redemption may be made within six months after final judgment has been rendered in any suit in which the validity of the sale is in question, provided the suit is commenced one year after such sale.

SOUTH CAROLINA

Art. I, Sec. 36. All property subject to taxation shall be taxed in proportion to its value.

Art. IX, Sec. 1. The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory, except mines and mining claims, the proceeds of which alone shall be taxed, and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes.

Sec. 4. . . . . It shall be the duty of the General Assembly to enact laws for the exemption from taxation of all public schools, colleges and institutions of learning, all charitable institutions in the nature of asylums for the infirm, deaf and dumb, blind, idiotic and indigent persons, all public libraries, churches and burying grounds; but property of associations and societies, although connected with charitable objects, shall not be exempt from State, county or municipal taxation: Provided, that this exemption shall not extend beyond the buildings and premises actually occupied by such schools, colleges, institutions of learning, asylums, libraries, churches and burial grounds, although connected with charitable objects.

Sec. 5. (Counties, townships, etc., may be vested with power to assess and collect taxes for corporate purposes, taxes to be uniform

within the jurisdiction; also for the taxation of shareholders and banks at the true value in money of shares.)

Sec. 13. (Provides that there shall be one assessment for State taxes in the subdivisions of the State.)

Art. XI, Sec. 6. (. . . Provides for an assessment on the taxable polls between 21 and 60 years of age, except Confederate soldiers above the age of 50 years, and an annual tax of $1.00 for each poll, the proceeds to go for school purposes. Provides for determining the amount of the poll tax in subsequent years.)

Sec. 12. (Provides that the net income from the sale of liquor licenses shall be applied in aid of supplementary tax system for public school purposes.)

Art. VIII, Sec. 6. (Provides that municipalities levy taxes for corporate purposes uniform on persons and property, and to levy license and privilege taxes so as to secure a just imposition of such tax upon the classes subject thereto.)

Sec. 8. (That cities and towns may exempt except for school purposes manufactories for a term of five years, by popular vote.)

Art. II, Sec. 4. (Payment of all taxes, including poll tax, prerequisite to voting.)

Art. III, Sec. 29. (All taxes to be laid upon actual value of property taxed.)

ADMINISTRATION.—The State Board of Equalization, composed of members elected by the County Boards of Commissioners, meets every fourth year for the equalization of assessments of real property among the several counties, towns, cities and villages, and also equalizes the assessment of textile industries, canals providing power for rent or hire, and fertilizer companies, in order to obtain uniformity of taxation upon the property of such industries.

The State Board of Assessors, composed of the Treasurer, Secretary of State, Comptroller, and Attorney-General, and the Chairman of Railroad Commissioners, assesses the railroad property used in operation and also other public utilities.

Township boards of assessors are appointed by the Governor; also in cities and towns, and special boards in Charleston and Columbia.

RAILROADS.—Railroad property used in operation is assessed by the State Board of Assessors, and the value of the right of way and track is apportioned, pro rata, to each mile of main track.

GROSS RECEIPTS TAX.—Domestic and foreign railroads, street railroads, telegraph, telephone, express, passenger car, navigation, waterworks, power and light companies pay the State for State purposes a gross receipts tax of three-tenths of 1 per cent on their gross

income from intra-State business. (See Civil Code, Sec. 369.) This tax is assessed by the State Board of Assessors.

CAPITAL STOCK TAX.—Domestic corporations of all classes, other than those just named, pay to the State for State purposes, a tax of one-half of 1 mill upon each dollar of paid-up capital stock. The minimum is five dollars. This is termed an annual license fee. (Civil Code, Sec. 364.) Similar foreign corporations pay a tax based upon the value of corporate property used in the conduct of their business within the State. The rate of this tax is one-half of one mill on each dollar of value of such property, with a minimum fee of five dollars.

All of these corporations, including railroad companies, pay a local general property tax for State and local purposes. They pay to the State for State purposes the gross receipts tax, and locally, the tax for the support of the Railroad Commission.

BANKS.—Shares of stock in national and State banks are assessed where bank is located at true value in money. Real estate is taxed to the bank and deducted from valuation of shares.

Unincorporated banks are assessed on average monthly assets for the year.

EXEMPTIONS.—Exemptions include property held for religious and educational purposes, Y. M. C. A. property not exceeding three acres of land, all bonds and stocks of the State and municipality, county and school district bonds, all rents accruing from real estate which shall not become due within two months after the first day of January in the year in which taxes are to be assessed thereon, all of any annuity not payable on or before August 1st of the year for which taxes are to be assessed, all wearing apparel of the taxpayer and his family, and articles for the present subsistence of the family up to $100.

POLL TAX.—An annual poll tax of one dollar is levied upon all males between 21 and 60 years of age, and the proceeds applied to educational purposes. Those incapable of earning a living are exempt. There is also a poll tax levied in the various counties for special improvement purposes, the rate and age varying in the different counties.

INCOME TAX.—A graduated tax is levied on incomes above $2500 derived from any source, deduction being allowed for necessary expense of carrying on the business, the rate being 1 per cent from

$2500 to $5000; 1½ per cent from $5000 to $7500; 2 per cent from $7500 to $10,000; 2½ per cent from $10,000 to $15,000, and 3 per cent for any amount above that. Incomes under $2500 are exempt. Counties do not share in the income tax.

COLLECTIONS.—The time of payment of taxes is from the 15th of October to the 31st of December, when penalties accrue. Delinquent taxes are collected by distress or warrant executed after March 15th. All personal property is liable to distress and sale, and real property on which taxes are delinquent may be seized and sold. All taxes are a lien upon the property taxed which attaches at the beginning of the fiscal year and expires in ten years.

SOUTH DAKOTA

(Constitution. Art. XI.)

Sec. 1. (Provides that the legislature shall levy an annual tax sufficient to pay the ordinary expenses of the State and not to exceed in any one year two mills on each dollar as ascertained by the last assessment.)

Sec. 2. All taxes shall be uniform on all property and shall be levied and collected for public purposes only. The value of each subject of taxation shall be so fixed in money that every person and corporation shall pay a tax in proportion to the value of his, her or its property. Franchises and licenses to do business in the State, gross earnings and net income, shall be considered in taxing corporations and the power to tax corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party. The legislature shall provide by general law for the assessing and levying of taxes on all corporate property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property. (Amended November, 1912.)

Sec. 3. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party.

Sec. 4. The legislature shall provide for taxing all moneys, credits, investment in bonds, stocks, joint stock companies, or otherwise; and also for taxing the notes and bills discounted or purchased, moneys loaned and all other property, effects or dues of every description, of all banks and of all bankers, so that all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals.

Sec. 5. The property of the United States and of the State, county and municipal corporations, both real and personal shall be exempt from taxation.

Sec. 6. The legislature shall, by general law, exempt from taxation, property used exclusively for agricultural and horticultural societies,

for school, religious, cemetery and charitable purposes, and personal property to any amount not exceeding in value two hundred dollars for each individual liable to taxation.

Sec. 7. All laws exempting property from taxation, other than that enumerated in Secs. 5 and 6 of this article, shall be void.

Sec. 8. No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same, to which the tax only shall be applied.

Sec. 9. All taxes levied and collected for State purposes shall be paid into the State Treasury. No indebtedness shall be incurred or money expended by the State, and no warrant shall be drawn upon the State Treasurer except in pursuance of an appropriation for the specific purpose first made. The legislature shall provide by suitable enactment for carrying this section into effect.

Sec. 10. The legislature may vest the corporate authority of cities, towns and villages, with power to make local improvements by special taxation of contiguous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such tax shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

Sec. 11. (Prohibits making of any unlawful profit out of public monies.)

(An amendment allowing classification in taxation was defeated at the election of November, 1916.)

ADMINISTRATION.—A tax commission was created by Act of 1913, consisting of three members appointed by the Governor, which has general supervision over the administration of the assessment and tax laws of the State and all assessing officers succeeding to and taking the place and inheriting the powers of the State Board of Equalization, and also has the power of assessment of railroads, not including street railways, and other public utilities and has also the power to order re-assessments.

RAILROADS.—Domestic and foreign railroads pay the general property tax locally, and assessment of operating property is made by the State Board. By Act of 1917 provision was made for the appraisal and taxation of express, railroad, telegraph and sleeping car companies on the unit plan with formulas for determining the valuation set out in the law. These values are certified to the various counties where property is located and taxes extended according to local levies.

CORPORATIONS.—The assessment of public utility corporations by the State Board is at the average of State and county local rates.

ASSESSMENTS.—After each individual has made his return for the total amount of his property, both personal and real, the county auditor deducts therefrom $25.00 in value in household furniture and provisions, and levies taxes upon the remainder. All property, personal and real, must be listed and assessed with reference to its value on the first day of May. Property must be listed in the county, town, or district where the owner or agent resides, except in the case of livestock, which shall be listed in the county in which the home "range" is situated, or where such livestock are pastured or ranged. Livestock may be assessed in the county where found ranging any time during the months from June to November, inclusive.

The abatement and refunding of assessments and taxes may be made by the Board of County Commissioners on due showing; and the statutory provision therefor was amended and enlarged by Act of 1917.

TIMBER CULTURE.—Trees planted under the Timber Culture Act of commerce, are not to be considered as an "improvement" on the land, nor are artesian wells to be considered in the assessment.

BANKS.—Shares of stock in national banks are assessed to the individual stockholders at the place where the bank is located.

Shares of stock of State banks shall be assessed to such banks and not to the individual stockholders. Officers of national banks are required to retain so much of any dividend belonging to stockholders as shall be necessary to pay taxes levied on their shares of stock, until it shall be made to appear to such bank that such taxes have been paid. Real estate of banks and improvements thereon are valued separately and assessed separately, and such assessment is deducted from valuation of shares.

COUNTY TAXATION.—An assessor is elected in each county or assessment district. Property is required to be assessed at its true value in money. Each county has a board of equalization which meets on the fourth Monday in June.

County and municipal taxes are levied upon the same assessment as that for State taxation. A road tax of two dollars per annum is authorized by the counties, which may be paid for in labor.

INHERITANCE TAX.—The inheritance tax (see Laws of 1915, Ch. 217) is imposed upon every transfer by will or intestacy, and is applicable whenever the property so transferred is within the jurisdiction of the State whether the decedent is a resident or a non-resident.

The rates are based upon the amount involved and upon the relationship of the recipient to the deceased, the exemption being $10,000 in the case of a widow or child whether natural or adopted, and $3000 in case of lineal ancestors; $1000 in case of brother or sister, $250 in case of collaterals and $100 in care of strangers, while the property of a clear value of $2500 is exempt when transferred to a religious or educational purpose. Where parties inherit, living outside the State, they are entitled to any such part of the exemption provided as the exemption exceeds the value of the property outside the jurisdiction received by him through such transfer. The rates vary from 1½ per cent in case of wife or lineal issue under $15,000 to three times the primary rate where in excess of $100,000.

The Tax Commission may stipulate as to the value of property subject to inheritance tax.

COLLECTION.—All taxes are payable on the first day of January and are delinquent on the first day of April following. Delinquent taxes draw 1 per cent interest. Property upon which taxes are delinquent may be sold after three weeks' published notice. After the sale of property for taxes, it is redeemable at any time within two years by paying the amount of purchase price plus 12 per cent per annum from the date of the sale, together with all taxes which are a lien at the time of redemption with interest thereon. Taxes on real property are a lien thereon.

Under Act of 1917, notice is given by the County Treasurer of delinquency in the payment of personal taxes, thirty days before the certification of the same to the sheriff; and a warrant to the sheriff for collection is in the form of a separate warrant for certificates covering all delinquent taxes of the individual debtor.

TENNESSEE

Art. II, Sec. 28. (In addition to other property, this section authorizes the legislature to exempt "one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee.") All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. But the legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct.

The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State,

shall not be taxed at a rate higher than the *ad valorem* tax on property.

The legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. (This section also authorizes a poll tax.)

Sec. 30. No article manufactured of the produce of this State shall be taxed otherwise than by inspection fees.

SPECIAL FEATURES.—The prominent feature of the taxing system of Tennessee is the system of privilege or license taxes upon the exercise of various occupations which is supplemental to the general property tax. There are also special corporation taxes and State, poll and inheritance taxes as well as specific taxes on land transfers and on litigation.

ADMINISTRATION.—The State Board of Equalization is composed of the Secretary of State, Treasurer and Comptroller, which biennially equalizes the assessment of all properties in the State.

The County Board of Equalizers, composed of five freeholders elected by the quarterly court of each county, equalizes assessments in the counties.

The State Board of Equalization of railroad assessments is composed of the Governor, Treasurer and Secretary of State. The County Board of Equalizers compares and equalizes the county assessments.

GENERAL PROPERTY TAX.—All property is subject to the general property tax, corporate as well as individual.

RAILROADS.—Domestic and foreign, steam and street railroads, telegraph and telephone companies pay the State for State purposes and locally for local purposes the general property tax on all property of railroads and on the local property of telegraph and telephone companies. The Railroad Commission is directed by statute to consider the value of capital stock, the franchise, the corporate property, the amount of gross receipts and the market value of both stocks and bonds. Railroads as well as telegraph and telephone companies, assessed in the same manner, pay to the State for State purposes the annual capital stock tax. See Laws of 1907, Ch. 434, as amended by laws of 1913.

The valuation of localized railroad property, though assessed by Railroad Commission, is not apportioned on the mileage basis, but is certified for local taxation to counties and incorporated cities wherein

the different items of the property are located. The localized property of street and interurban railroads are assessed in practically the same manner.

EXPRESS COMPANIES.—Express companies, domestic and foreign, are subject to a State privilege tax ranging from $1000 to $2500 per annum according to the length of route in the State. They also pay the general property tax assessed and collected locally for both State and local purposes and the capital or annual charter tax for State purposes.

CAR COMPANIES.—Sleeping car companies pay the State for State purposes an annual privilege tax of $3000 and the capital stock or annual charter tax. Freight car companies pay the annual capital stock tax and are subject also to the general property tax.

PUBLIC UTILITY COMPANIES.—Electric light and other public utility companies pay locally the general property tax for State and local purposes and also the capital stock or annual charter tax and privilege taxes. The county and municipality is authorized to levy privilege taxes not exceeding the amount levied for State purposes. See Laws of 1907, pages 206, 209.

BUSINESS CORPORATIONS.—General business corporations pay locally the general property tax and pay also the capital stock tax. (Laws of 1907, Ch. 434.) And certain classes pay locally privilege taxes.

BANKS.—Bank stock is assessed in name of shareholders at its cash value, less proportionate share of realty and tangible personalty assessed to the bank. The corporation is held liable for payment of the tax.

POLL TAX.—A poll tax of $1.00 per annum is imposed on every male inhabitant between the ages of 21 and 50 years, except those who are deaf, dumb, blind or incapable of earning a livelihood, and this tax is distributed between the school districts in proportion to the number of school children. The payment of taxes is prerequisite to voting. The municipal poll tax is limited to $1.00.

EXEMPTIONS.—Exemptions in addition to public property include all property belonging to any religious, charitable, scientific, or educational institution not used in secular business, also leaseholders holding under institutions of learning, whose rents are used for edu-

cational purposes, cemeteries and monuments, growing crops, the direct produce of the soil in the hands of the producer or his immediate vendee, manufactured articles of the State in the hands of the manufacturer; personal property of the value of $1,000 in the hands of each taxpayer.

INHERITANCE TAX.—The inheritance tax is paid to the State on all inheritances of $5000 and over. Husband, wife and lineal ancestors and descendants on $5000 and over and less than $20,000 are taxed at 1 per cent of clear market value, while inheritances of $20,000 and over are subject to a tax of 1¼ per cent. Where inheritance is to any other than the above class and is of $250 and over, the tax is 5 per cent.

All estates situated within the State, whether the parties die seized thereof are domiciled within or without the State, are subject to the tax.

ASSESSMENT.—Personal property is assessed annually, real estate every even-numbered year. The taxpayer must return all his property without regard to any exemption. Changes to the extent of $200 in the value of any real estate are to be noted annually by the assessor as well as any improvements thereon. Merchants are assessed on the average capital invested in the business during the year, manufacturers on the raw materials and articles in process of manufacture, but the value of articles finished from the produce of the State in the hands of the manufacturer is to be deducted in assessing property or capital stock.

COUNTY AND MUNICIPAL TAXATION.—The property included in the assessment and equalization are the same for county and cities as for the State. The county is authorized to levy a privilege tax upon merchants and other occupations declared to be privileges not exceeding an amount levied by the State for State purposes. The municipal poll tax is not to exceed $1.00 and the municipality is authorized to levy the same privilege taxes as the State and county.

COLLECTIONS.—Taxes are a lien on lands as of January 10th of each year and are due on the first Monday in October. Fines and penalties are not affixed until the month of February following the previous year of assessment. There is no lien for taxes against personalty without issuance of distress warrants, as provided in Thompson Shannon's Code, Secs. 876, 877. (See Edmundson v. Walker, 195 S. W. 168.)

TEXAS

Art. VII, Sec. 1. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax: Provided, that two hundred and fifty dollars' worth of household and kitchen furniture, belonging to each family in the State, shall be exempt from taxation, and, provided further, that the occupation tax levied by any county, city or town, for any year, on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business.

Sec. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes (and the necessary furniture of all schools), and institutions of purely public charity; and all laws exempting property from taxation, other than the property above mentioned, shall be void.

Sec. 4. The power to tax corporations and corporate property shall not be surrendered or suspended by act of the legislature, by any contract or grant to which the State shall be a party.

Sec. 8. All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including so much of the road-bed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located, and the county tax paid upon it shall be apportioned by the Comptroller in proportion to the distance such road may run through such county, among the several counties through which the road passes, as a part of their tax assets.

Sec. 10. The legislature shall have no power to release the inhabitants of, or property in, any county, city or town, from the payment of taxes levied for State or county purposes. unless in case of great public calamity in any such county, city or town, when such release may be made by a vote of two-thirds of each House of the legislature.

Sec. 17. The specifications of the objects and subjects of taxation shall not deprive the legislature of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this Constitution.

Sec. 19. Farm products in the hands of the producer and family

supplies for family and home use are exempt from all taxation until otherwise directed by a two-thirds vote of all the members elected to both Houses of the legislature. Rev. Stats. 1895, p. 142, Ch. 9, Sec. 544, 545.

ADMINISTRATION.—A State Tax Board consists of a State Tax Commission, Comptroller of Public Accounts and Secretary of State. This board values the intangible assets of railroad, ferry and bridge companies, with powers of investigation and of supervision of the enforcement of the revenue laws of the State. A State Revenue Agent also acts in this supervision. (See R. S., Sec. 7366.)

The essential features of the tax system of the State are:

First—The taxation of all property, corporate and individual, real and personal, except that of car companies, under the General Property Tax for State and local purposes.

Second—A system of annual franchise taxes, for State purposes, upon foreign and domestic corporations, based on the full amount of authorized capital stock, plus surplus and undivided profits. This is applied to all corporations, except transportation companies, subject to occupation taxes on gross receipts and certain financial companies and agricultural fair associations. (See Revised Stat., Art. 7393-7406. Laws of 1911 and Laws of 1913.)

Third—An extensive system of license or privilege taxes on a great variety of occupations both corporate and individual. (See Rev. Stat., Art. 7355-7366.)

LICENSES.—Occupation taxes based on gross receipts of certain classes of corporations may not be levied for local purposes. Privilege taxes of specific amounts may, however, be levied by counties, cities and towns, but only at one-half of the amount respectively levied for State purposes. (R. S., Art. 7357.)

(When the legislature has declared that a named occupation shall be taxed for the benefit of the State, and has fixed the amount of the tax, then a county, city or town has the power to tax that occupation. Hoelfling v. San Antonio, 85 Tex. 228, 1892.)

RAILROADS.—Railroad, bridge and ferry companies, domestic and foreign, in addition to the general property tax locally for State and local purposes on all property, including intangible value (excepting companies operating under a Federal charter), pay the graduated capital stock tax to the State for State purposes. Intangible property of such companies is assessed by the State Tax Board, and this is done

by first obtaining the aggregate value of the entire system, and then deducting the value of real and personal property not used in the railroad business. The portion of the remainder representing the taxable value of the railroad property in Texas, is then determined on the land track mileage business, and from this portion is deducted the value of the tangible property as determined by the State Board. (R. S., Art. 7420.)

All tangible property of railroads, except rolling stock, is assessed by the County Assessor of each county through which the road passes, and rolling stock is listed with the County Assessor of the county wherein the principal office of the railroad is located. A distribution of the taxable value of the intangible property of bridge and ferry companies is based on the percentage of business done in each county. Counties doing exclusively a railroad terminal business, pay the general property tax locally for State and local purposes, and, in addition, pay the State for State purposes 1 per cent on total gross receipts.

TELEGRAPH, TELEPHONE, ETC.—Telegraph, telephone and express companies pay the general property tax for State and local purposes, and, in addition, pay a gross receipts tax to the State as fixed by the statute. (R. S., Art. 7370.)

CAR COMPANIES.—Sleeping and other car companies do not pay the general property tax, but pay a gross receipts tax in lieu thereof for State purposes, and a tax of 25 cents on each $100 on the capital stock employed in Texas.

OIL COMPANIES.—Oil, well and pipe line companies, light, water and gas companies all pay the State tax, graduated franchise tax, and the gross receipt tax in addition to the general property tax.

ASSESSMENT.—Personal property temporarily removed from the city or county, is assessed at the principal office of the owner. Indebtedness bearing interest may be deducted from credits bearing interest.

CORPORATE SHARES.—Shares of capital stock of corporations which returned their capital or property for taxation, are not taxed to the resident holders. When corporate property is not assessed in the State, resident stockholders are subject to the general property tax on their stock. (R. S., Art. 7503-7532.)

BANKS.—The property of a State bank is assessed against the bank. National banks are taxed on their real estate, and the shares are

assessed to the individual holders, less the assessed value of the bank's real estate, that is, a proportionate part against each shareholder. The taxes, if not paid by the shareholder, become a lien upon the property of the banking corporation. Deposits are deducted from assets.

INHERITANCE TAX.—The inheritance tax exempts property passing to father, mother or child, or direct lineal descendant, or to charitable, educational, or religious institutions. When property exceeds the minimum of $500 and passes to other persons, the tax is varied according to the relationship of the deceased. (See R. S., Art. 7487-7502.)

The tax is levied upon all property thus transferred, within the jurisdiction of the State, whether belonging to the inhabitants of the State or not.

POLL TAX.—There is a poll tax for State purposes of one dollar and counties may impose a poll tax of 50 cents.

COLLECTION.—Taxes are payable on all property owned on the first day of January in the county where situated. Taxes may be paid at any time after October 1st, and become delinquent on the first day of January, after which the Tax Collector may seize and sell the property of the delinquent to satisfy his taxes, subject in the case of real estate, to redemption by the owner within two years. Suit may be brought after July 1st by the District or County Attorney for the recovery of State and county taxes, and a lien enforced on real property for taxes due. In such case the suit proceeds as other law suits, and real property is sold under an order of sale issued out of court.

The State tax rate is limited to fifty-five cents; county or city rate to forty cents, except for the payment of debts or for the erection of public buildings, not to exceed twenty-five cents on the $100, except as provided in the Constitution.

(References are to Vernon-Saylor Rev. Stat.)

UTAH

Art. XIII, Sec. 2. All property in the State, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word property, as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of stocks of any

company or corporation when the property of such company or corporation, represented by such stocks, has been taxed.

Sec. 3. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. Provided, that a deduction of debts from credits may be authorized. Provided, further, that the property of the United States, of the State, counties, cities, towns, school districts, municipal corporations and public libraries, lots with buildings thereon used exclusively for either religious worship or charitable purposes, and places of burial not held or used for private or corporate benefit, shall be exempt from taxation. Ditches, canals and flumes owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose.

Sec. 4. (Same as Montana Const., Art. XII, Sec. 17.)

Sec. 10. All corporations or persons in the State, or doing business therein, shall be subject to taxation for State, county, school, municipal or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.

Sec. 12. Nothing in this Constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses or franchises. (Amended 1906.)

ADMINISTRATION.—The State Board of Equalization of four members appointed by the Governor equalizes the assessed value of property between the different counties and between the different classes of property throughout the State. The County Board of Equalization equalizes between individuals and may abate the taxes of insane, infirm or indigent persons not exceeding $10.00, may enter omitted property and correct false and incomplete assessments.

RAILROADS.—All property and franchises except those derived from the United States owned by railroad and other public utility corporations operating in more than one county are assessed by the State Board of Equalization and apportioned to each county in which they are located, rolling stock and railroad franchises according to mileage by the unit rule. These corporations also pay the annual license fee (*infra*).

The County Board apportions the assessments to the several cities and towns or other taxing districts. The State Board of Equalization

determines the rate of tax due, after allowing 10 per cent on the proceeds for delinquents and in case of collection must be sufficient to raise the revenue required, subject to the limitations of the Constitution of eight mills on each dollar of valuation.

CORPORATIONS.—Corporations are taxed under the General Property Tax, there being an annual license fee to be paid the State in addition to the property taxed based on the amount of the capital stock.

Corporations organized for religious and charitable purposes, or private water corporations for culinary purposes and for furnishing water to its own members, and all canal and irrigation corporations are exempted from the payment of this tax.

Insurance companies are required to pay 1½ per cent of the gross premiums received, less the amount of premiums returned.

Property taxes paid are deducted from the insurance gross receipt tax.

BANKS.—Real estate and the improvements are separately assessed. Bank stock is assessed against the shareholders and paid by the bank, the bank having a lien on the stock for the payment of the taxes. Shares of a national bank located without the State, owned by a resident of the State, are not subject to taxation.

Private bankers, brokers and foreign bankers are assessed on the average balance of credits over liabilities for the ninety days preceding the verified statement of the conditions of the business required.

MINES.—Mines are valued on their net proceeds. Buildings, improvements and machinery of mines are assessed independently of production. The valuation is made by the State Board of Equalization. By Act of 1917, in addition to an *ad valorem* tax on the net proceeds, 3 per cent of the net proceeds was added as an occupation tax.

(A constitutional amendment was submitted to be voted on, taking effect, if adopted, January 1st, 1919, providing specifically for the valuation of metalliferous mines and mining claims at five dollars per acre, and in addition thereto at a value based on some multiple or sub-multiple of the annual proceeds thereof and for the assessment of other mining property, machinery, etc., at full value.)

TRANSIT LIVE STOCK.—Transit live stock is assessed which remains in the State over twenty days.

EXEMPTIONS.—In addition to all public property, public libraries, churches, cemeteries not held for private benefit, property used for charitable purposes, ditches, canals and other property used for irrigation and mortgages on both real and personal property are exempted.

POLL TAX.—There is no State poll tax but a county poll tax of $3.00 for the use of roads and highways which may be paid by personal service of two days' work on a highway.

INHERITANCE TAX.—There is a graded inheritance tax on all property passing, on account of the death of the owner to any inheritor, above the market value of $10,000. There are no exemptions, and the relation of the decedent to the inheritor is immaterial.

The county court determines the amount to be paid by the heirs. The entire tax is paid to the State.

The tax applies to all property within the jurisdiction of the State, whether belonging to a resident or non-resident, and whether tangible or intangible. When any property belonging to a foreign estate is subject to the payment of the tax, it is assessed upon the market value of the property remaining after the payment of just debts, and expenses are chargeable to the property under the laws of the State.

Shares of stock in Utah corporations are held subject to the tax, whether owned by residents or non-residents.

COUNTY TAXATION.—The State Road Commission may require counties of an assessed valuation under two million dollars, to duplicate one-quarter of the amount of the State Road Fund available for use in said counties. Counties whose assessed valuation is between two million and four million dollars, may be required to duplicate one-half the amount the State has made available for the use of such counties.

Each person holding taxable property in the county is required to list the property for taxation with the County Assessor. Any person, after demand by the Assessor, refusing to make a sworn statement as to his property, or to appear and be examined, forfeits to the county $100 for each refusal, and loses his standing before the County Commissioners to secure a reduction of his assessment.

ASSESSMENTS.—Property is assessed at its full cash value, the amount of which is determined by what the property would be taken in payment of a just debt from a solvent debtor.

Taxpayers are allowed to deduct from the gross amount of credits *bona fide* debts owing by them, except unpaid subscriptions to capital

stock of corporations, obligations of suretyship and insurance premium notes.

COLLECTION.—Taxes are collected by the County Treasurer and are a lien on personal and real property. Taxes on personal property are a lien on real property. Taxes on improvements are a lien on the land and improvements. Liens attach the first day of January. Taxes are due the first Monday of September and are delinquent on the 15th of November. Personal property may be seized for taxes, except when real estate is liable therefor.

After the publication of the delinquent tax list on the first Monday of December, real property may be sold on the third Monday of December for the payment of taxes. Such property may be redeemed within four years upon the payment to the County Treasurer of the amount of the purchase price and costs and 1½ per cent monthly interest on the amount of said purchase price, together with all taxes paid by purchaser.

VERMONT

Chapter 1, Art. IX. Every member of society has a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service, when necessary, or an equivalent thereto, but no part of any person's property can be justly taken from him, or applied to public uses without his consent, or that of the representative body of the freemen . . . ; and previous to any law being made to raise a tax, the purpose for which it is to be raised ought to appear evident to the legislature to be of more service to the commonwealth than the money would be if not collected.

In Sprague v. Fletcher, 69 Vt. 69, 37 L. R. A. 840, a State tax allowing to residents the deduction of debts without allowing such deduction to non-residents was held a denial of the equal privileges and immunities of citizens guaranteed by the United States Constitution, Article IV, Section 2. See Sec. 527, *supra*.

ADMINISTRATION.—A State Tax Commissioner has general power of supervision of tax administration, and also acts with the Secretary of State as Commissioner of Foreign Corporations.

There is a practical separation of the sources of State and local revenues, as the administration of the State Government has been practically supported in recent years by corporation fees and taxes.

RAILROADS.—Vermont has an exceptional feature of railroad taxation in that railroads have the option of paying one-seventh of 1 per cent of their appraised value, or 2½ per cent of the gross earnings

on their mileage in the State. It is said that the railroads all but invariably choose the latter alternative.

The real estate of railroads not used in the actual operation of the road is taxed as other real estate.

PUBLIC UTILITY CORPORATIONS.—Telephone companies pay 3 per cent on their gross earnings in the State; telegraph companies 60 cents per mile for one wire and 40 cents per mile for each additional wire, or 3 per cent on business in the State. Sleeping car and palace car companies pay 5 per cent on gross earnings in the State, express companies 4 per cent on gross receipts of business in the State. Steamboat, car and transportation companies pay seven-tenths of 1 per cent on appraised value of property and franchises.

CORPORATIONS.—There is a license tax on corporations, foreign and domestic, doing business in the State, having capital stock or deposits of $50,000 or less, $10; for each additional $50,000 or less, $5 more, but no tax exceeding $50. The real and personal property of such corporations is taxed in the town where located. All domestic and foreign corporations doing business in Vermont are required to file with the Commissioner of Taxes a sworn statement showing the residence in the State of each shareholder and the par value of shares.

BANKING INSTITUTIONS.—The real estate of banks and savings institutions is taxed as other real estate and the stock in banks is taxed to the holder. In the valuation of the stock deduction is made of the real estate of the bank taxed in Vermont or elsewhere.

There is also a tax upon deposits paying interest of 2 per cent originally taxed against the depositor, but in State financial institutions it is assumed and paid by the institution at a rate of seven-tenths of 1 per cent computed upon the average amount of such deposits. A tax of seven-twentieths of 1 per cent on the interest paying deposits in national banks, which was assumed by the bank was held valid both by the State Supreme Court, 84 Vt. 167, and also by the Supreme Court of the United States, 231 U. S. 120, *supra*, Sec. 307, the courts holding that there was no unjust discrimination in favor of State institutions, though depositors in the latter were exempt from taxation on their deposits up to $2,000, such institutions paying a franchise tax of seven-tenths of 1 per cent upon the average amount of deposits, after deducting the deposits in excess of $2,000, nor because persons whose deposits did not bear interest in excess of 2 per cent per annum were also exempted in the State institutions.

MANUFACTURING AND MERCANTILE COMPANIES.—Manufacturing and mercantile companies are subject to an annual license tax for State purposes; and their real and personal property is taxed in the town where located. Insurance and guaranty companies pay 2 per cent on the gross amount of premiums or assessments in the State, with special provision as to domestic life insurance companies, and savings banks seven-tenths of 1 per cent on the average amount of deposits and accumulations.

POLL TAX.—A poll tax of two dollars on all male inhabitants, citizens and aliens over twenty-one and under seventy years of age, is imposed. Those honorably discharged in the army and navy in the Civil War and members of State militia and fire companies are exempt.

EXEMPTIONS.—Exemptons include household furniture up to $500, wearing apparel, private and professional libraries, mechanic's and farmer's tools, provisions necessary for the consumption of a family for one year, certain cattle, and hay and produce sufficient for wintering out of stock, and for each person one wagon, one sleigh and one harness, but no pleasure wagon or vehicle exceeding $100 in value is exempt. Exemptions also include property used for public, pious and charitable purposes. There is also a limited exemption of uncultivated lands planted with timber or forest trees. Towns are authorized to exempt for a term not exceeding ten years, manufacturing establishments and hotels for not exceeding five years. As to local exemptions, see Caverly Gould Co. v. Springfield, 83 Vermont 396. Automobiles are exempted from taxation and motor boats (not valued in excess of $100). Deposits in bank whereon interest in excess of 2 per cent is paid are exempt. Homesteads may be exempted for a term of five years by vote of the town. Notes secured by real estate mortgages bearing 5 per cent interest or under are exempt when loan is made in Vermont and the real estate is there situated. Provision is made for off-set of debts up to $1,000.

INHERITANCE TAX.—An inheritance tax of 5 per cent is levied upon all property, and interest thereon within the jurisdiction of the State, whether tangible or intangible, where the devise is to any person other than father, mother, husband, child or adopted child, son-in-law or daughter-in-law, or for charitable, religious or educational institutions, property of which is exempt from this tax.

Vermont has a tax of 5 per cent on all property found within the State, whether of resident or non-resident, but allows a non-resident

to deduct amount of taxes paid in the State of the inheritor's domicile to the amount of 5 per cent, and if the non-resident has paid less than 5 per cent at his residence he will be required to pay the difference to the State of Vermont. This reciprocity statute excludes the Federal government.

ASSESSMENT.—Real estate was assessed in 1914 and is assessable quadrennially thereafter. Personal property and also improvements on or additions to or depreciations on real estate are assessed annually on April 1st.

In the assessment of personal property the taxpayer is allowed an offset, the amount of which is determined by deducting from the amount of his personal property exempted by law the amount of his indebtedness, duly itemized, owing by him on the first day of April whereon no interest or a rate less than 6 per cent is payable; 50 per cent of this remainder, if any, is deducted from his taxable personal estate, provided that such deduction is in no case to exceed $1,000.

COLLECTIONS.—Taxes are paid in the month of February to the Commissioner of State Taxes.

Taxes are payable on or before September 15th, or semi-annually on or before the 15th day of March and September; the semi-annual period terminating the last day of June or December next preceding.

Lands are sold for taxes by the first constable of the town, and lists are filed with him before the first day of August; and lands are advertised for sale on the 15th of August. Lands may be redeemed within one year from date of sale by paying such costs and 12 per cent interest.

(For exposition of the Vermont system for schools, see Woodruff's New Book of Vermont Taxes and Partial Payments, Ginn & Co., Boston.)

VIRGINIA

(Constitution of 1902.)

Bill of Rights, Sec. 11. No person shall be deprived of his property without due process of law.

Art. II, Sec. 21. (The payment of State poll taxes at least six months prior to election during three years preceding the offer to vote is made a prerequisite of the right to vote after January 1, 1904.)

Art. III, Sec. 50. Every law imposing, continuing or reviving a tax shall specifically state such tax and no law shall be construed as so stating such tax, which requires reference to any other law or to any other tax.

Art. VIII, Sec. 128. In cities and towns the assessment of real

estate and personal property for the purposes of municipal taxation shall be the same as the assessment thereof for the purposes of State taxation, whenever there shall be a State assessment for such property.

Art. XII, Sec. 157. (Annual registration fees are required of every domestic corporation and foreign corporation doing business in the State, of not less than $5 nor more than $25, which shall be irrespective of any specific license or other tax imposed by law upon such company for the privilege of carrying on business in the State, or upon its franchise or property; provision to be made therefor by general laws.)

Art. XIII, Sec. 168. All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

Sec. 169. Except as hereinafter provided, all assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. The General Assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added. Nothing in this Constitution shall prevent the General Assembly, after the first day of January, nineteen hundred and thirteen, from segregating for the purposes of taxation, the several kinds or classes of property, so as to specify and determine upon what subjects, State taxes, and upon what subjects, local taxes may be levied.

Sec. 170. The General Assembly may levy a tax on incomes in excess of $600 per annum; may levy a license tax upon any business which cannot be reached by the *ad valorem* system; and may impose State franchise taxes, and in imposing a franchise tax, may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation. Whenever a franchise tax shall be imposed upon a corporation doing business in this State or whenever all the capital, however invested, of a corporation chartered under the laws of this State, shall be taxed, the shares of stock issued by any such corporation shall not be further taxed. No city or town shall impose any tax or assessment upon abutting land owners for street or other public local improvements, except for making and improving the walkways upon then existing streets, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting land owners. Except in cities and towns, no such taxes or assessments for local public improvements shall be imposed on abutting land owners.

Sec. 171. The General Assembly shall provide for a reassessment of real estate, in the year nineteen hundred and five, and every fifth year thereafter, except that of railway and canal corporations, which, after January the first, nineteen hundred and thirteen, may be assessed as the General Assembly may provide.

Sec. 172. The General Assembly shall provide for the special and separate assessment of all coal and other mineral land; but until such special assessment is made such land shall be assessed under existing laws.

Sec. 173. (Provides for the levy by the General Assembly of a State capitation tax not exceeding $1.50 per annum on every male resident of the State of not less than 21 years of age, except those pensioned by the State for military services, $1 thereof for the schools and the residue to be applied for county or State purposes; but this capitation tax is not to be collected from any exempt property. An additional capitation tax may be authorized by the General Assembly for any county or city, not exceeding $1 per annum on every resident, to be applied in aid of public schools, or for county or State purposes.)

Sec. 174. After this Constitution shall be in force, no statute of limitation shall run against any claim of the State for taxes upon any property; nor shall the failure to assess property for taxation defeat a subsequent assessment for and collection of taxes for any preceding year or years, unless such property shall have passed to a *bona fide* purchaser for value, without notice; in which latter case the property shall be assessed for taxation against such purchaser from the date of his purchase.

Sec. 176. (The roadbed, real estate, rolling stock and all personal property of railway corporations, the canal bed and other real estate of canal companies, is to be valued by the State Corporation Commission at such rates of taxation as may be imposed by them respectively, for State, county, city, town or district purposes, upon the real estate and personal property of natural persons. But no income tax is to be levied upon such corporations.)

Secs. 177 and 178. (Provide for an annual State franchise tax upon railway and canal corporations, including those exempt from taxation as to their works, visible property or profits, equal to 1 per cent upon gross receipts for the privilege of exercising franchises in the State, these gross receipts in the case of interstate lines being computed upon the mileage basis, a reasonable deduction being made "because of any excess of value of terminal facilities or other similar advantages in other States over similar facilities or advantages in this State." This franchise tax with the property taxed in Section 176 being in lieu of all other taxes or licenses upon the corporate franchises or shares of stock in property, but does not exempt from the annual corporation fee under Section 157, nor from assessments for street and other public local improvements, nor does it affect contracts made with municipalities for compensation for the use of streets or alleys.)

(Under Sections 179 and 180 provision is made for annual reports of property subject to taxation and for the collection of taxes and a special procedure is authorized for the judicial determination of complaints of tax assessments.)

Sec. 182. Until otherwise prescribed by law, the shares of stock issued by trust or security companies chartered by this State, and by incorporated banks, shall be taxed in the same manner in which the

shares of stock issued by incorporated banks were taxed, by the law in force January the first, nineteen hundred and two; but from the total assessed value the shares of stock of any such company or bank, there shall be deducted the assessed value of its real estate otherwise taxed in this State, and the value of each share of stock shall be its proportion of the remainder.

Sec. 183. (This section contains a list of property which, and which only, shall be exempt from taxation, State and local, but it is provided that the General Assembly may hereafter tax any of the property exempted except property directly or indirectly owned by the State or its subdivisions and obligations issued by the State since February 14, 1882, or hereafter exempted by law. The exempt property, subject, however, to be taxed by the General Assembly, includes buildings and furniture and furnishings used for religious worship or for the residence of the minister; private and public burying grounds; property held for educational or charitable purposes, when not owned by corporations having shares of stock, and permanent endowment funds of such educational or charitable institutions. "But the exemption mentioned in this sub-section shall not apply to any industrial school, individual or corporate, not the property of the State, which does work for compensation, or manufactures and sells articles, in the community in which such school is located; provided, that nothing herein contained shall restrict any such school from doing work for or selling its own products or any other article to any of its students or employees." It is also provided that no inheritance tax shall be charged directly or indirectly against any legacy, when devised to any institution whose property is exempt from taxation. Where buildings or lots are leased and made the source of revenue, they shall be subject to local taxation. "Obligations issued by counties, cities, or towns may be exempted by the authorities of such localities from local taxation.")

Sec. 188. No other or greater amount of tax or revenue shall, at any time, be levied than may be required for the necessary expenses of the government, or to pay the indebtedness of the State.

Sec. 189. (Limits the rate of taxation on all lands and improvements and on all tangible personal property not exempt from taxation by the provisiouns of this article. A special tax for pensions is also authorized for a limited time.)

ADMINISTRATION.—The State Corporation Commission, now known as the State Tax Board has the powers declared in the Constitution, *supra*, in the assessment of the value of properties of railroad and canal companies. The Circuit Court of the City of Richmond is given jurisdiction to hear and determine any complaint made by any corporation as to its assessment.

The general property tax applies to nearly all classes of property,

but corporations are subject to supplemental taxation as hereinafter stated.

Railroad and canal companies are not only subject to the general property tax for which they are assessed by the State Board, but also to what is termed a "charter tax" based on the authorized capital stock and to a gross receipt or franchise tax of 1 per cent upon the gross transportation receipts. (See Constitution, Secs. 177, 178, Code of 1904, p. 2205.) The gross receipts of interstate transportation companies are ascertained by taking the average gross transportation receipts per mile over the whole extent within and without the State, and then taking the proportion due to the mileage within the State, and due regard being made to any excess of value of the terminal facilities or other similar advantages of other States over those in Virginia. (Laws of 1914, Ch. 135.)

The rolling stock of foreign corporations doing business in the State is assessed on the average amount of property habitually used in the State.

PUBLIC UTILITY COMPANIES.—This class of corporations, including domestic and foreign telegraph and telephone companies and express companies, car companies, steamboat companies, water, heat, light and power companies, are assessed by the State Board for State purposes and locally for local purposes under the general property tax. In addition domestic telephone companies with an authorized capital stock of more than $5,000 and all domestic telegraph companies pay the State for State purposes the capital stock or annual State franchise tax. (Laws of 1910, Ch. 58.) And all telegraph and telephone companies pay the annual charter tax or State registration fee. (Laws of 1908, Ch. 227.) And certain State gross receipts and mileage taxes which are determined by the State Board. Express companies also pay the general property tax with the annual charter tax and mileage tax and the same is the case with domestic and foreign passenger car companies.

BUSINESS CORPORATIONS.—Domestic and foreign manufacturing, mercantile, mining and miscellaneous companies pay the general property tax assessed and collected locally for State and local purposes on real estate and capital, except that in lieu of the State general property tax on capital of mercantile companies there is imposed an annual State license tax for State purposes based on the amount of annual purchases. In addition the home companies pay to the State for State purposes the capital stock or annual State

franchise tax, and both domestic and foreign companies pay to the State for State purposes the annual charter tax or State registration fee. (Code, Sec. 485, Laws of 1908, Ch. 213, Laws of 1910, Ch. 314.)

FOREIGN CORPORATIONS.—Foreign corporations are taxed in practically the same manner as similar domestic corporations, except that foreign corporations are not required to pay the capital stock or annual State franchise tax which is imposed on certain domestic corporations. (Laws of 1910, Ch. 58.)

MINING PROPERTIES.—Mineral lands and the fixtures and machinery thereon are separately assessed by the Commissioners of Revenue, who may be assisted by special assessors employed by the State Tax Board. Mineral lands developed and undeveloped are separately shown on the assessment books. Standing merchantable timber is also separately assessed.

BANKS.—See Constitution, Sec. 182, *supra*.

PLANTED OYSTERS.—Planted oysters are assessed as personal property by the inspectors of oysters annually on the first day of October.

LICENSE TAXES.—There is an extensive system of State license taxes which supplement the general property tax as to individuals as well as corporations. A large amount of license taxes upon occupations and transactions is imposed for State purposes.

POLL TAX.—There is a capitation tax of $1.50 for every male inhabitant over twenty-one years of age.

EXEMPTIONS.—The exemptions from taxation as fixed by the Constitution are public property, and, unless specially taxed by the General Assembly, places of worship, private and public cemeteries, colleges and schools; and it is also provided that no inheritance tax shall be charged directly or indirectly against any legacy or devise for the benefit of any institution whose property is exempt from taxation.

Obligations issued by counties, cities or towns may be exempted by the authorities of such localities from taxation.

Shares of stock in companies, all of whose capital is taxed by the State, and the shares of companies who pay a franchise tax in the State are exempt from taxation.

INHERITANCE TAX.—By Act of 1916 (Ch. 484) a direct and collateral graduated inheritance tax is imposed in lieu of the former collateral inheritance tax. Direct inheritances in excess of $15,000 are taxed, and the tax on collateral inheritances in excess of $50,000 is increased. (See also Ch. 81, Laws of 1916.)

All property thus transferred within the State, whether of residents or non-residents, is taxed.

INCOME TAX.—An income tax for State purposes is imposed on net incomes in excess of $2,000 at a rate of 1 per cent, subject to specified deductions. By Act of 1916 this individual income tax was extended to corporations, except public service corporations paying the State franchise tax upon receipts and insurance companies paying a State license tax upon both premiums, and except State and national banks and trust companies engaged in a banking business (Ch. 472). By supplementary act it was provided that no income tax or *ad valorem* taxes, State or local, shall be imposed upon the stocks, bonds, investments, capital, or other tangible property owned by domestic corporations which had no part of their business within the State.

CLASSIFICATION.—By Act of 1916 (Ch. 382, Laws of 1916) changes were made in the classification of intangible property for the purpose of taxation, defining capital, and gross, and net assets, as the terms are used in the act.

ASSESSMENTS.—Once in every five years real estate is assessed for taxation by commissioners appointed according to law. These commissioners report the assessments in triplicate to the Clerk of the Circuit Court, to the Auditor of Public Accounts, and to the Commissioner of the Revenue of the County.

County and municipal taxes are based upon the same assessment as that for State purposes, but counties and municipalities do not share in the inheritance tax, or corporation taxes, and the State licenses, or the income tax. One-third of the State poll tax is paid into the City Treasury when collected, and fifty cents thereof is paid into the county treasury where collected.

COLLECTIONS.—From July 1st to December all taxes are payable. Delinquent taxes are penalized 5 per cent of the amount of the assessment. Taxes are a lien on all real estate. The State also has a lien on all land derived from real estate for the taxes of the current year. Lands which become delinquent for non-payment of taxes may be sold on the subsequent 15th day of December. Reference is particularly

made to the provisions of the State Constitution and statutes, and for further information application should be made to the State Board.

WASHINGTON

Art. VII, Sec. 2. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: Provided, that a deduction of debts from credits may be authorized; Provided, further, that the property of the United States, and of the State, counties, school districts and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation.

By amendment of 1890, the legislature was also empowered to exempt personal property of each head of a family to the amount of $300.

Sec. 4. (The same as La. Const. 1898, Art. 228.)

Sec. 5. (The same as Iowa Const. 1857, Art. VII, Sec. 7.)

Sec. 9. The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

In the Organic Act organizing the territory enacted by Congress in 1853, it is provided:

"And all taxes shall be equal and uniform and no distinction shall be made in the assessments between the different kinds of property, but the assessment shall be made according to the value thereof."

(An amendment allowing classification of property for taxation was defeated in 1908.)

The question of calling a constitutional convention for framing a new Constitution is to be voted on at the general election of 1918.

ADMINISTRATION.—The duties formerly imposed upon the State Tax Commission are by Act of 1917 vested in a State Tax Commissioner. The State Board of Equalization consists of the State Auditor, the Commissioner of Public Lands and the State Tax Commissioner, who is the secretary of the board. Local assessors are elected and are eligible for more than two successive terms.

The Board of Equalization classifies and equalizes the assessments of the State.

RAILROADS.—The "operating property" of railroads, including franchise value under the unit rule, is assessed by the State Commissioner with a right to a further hearing before the State Board of Equalization. This assessed value is apportioned to the counties according to mileage. The local property of such railroad companies is assessed by the local assessor. Railroads are subject to the local franchise tax, *infra*.

INHERITANCE TAX.—The inheritance tax applies to all property within the jurisdiction of the State, whether of residents or non-residents, exempting $10,000 in case of parent, wife, or husband, or descendant, natural or adopted, and with rates graded from 1 to 12 per cent, according to degree and amount of inheritance. Changes were made in rates by Act of 1917. The tax applies to all property, whether tangible or intangible.

Where property belongs to a foreign estate the tax is assessed on the market value remaining after payment of debts chargeable to the estate. On a proper showing being made, such proportion of indebtedness may be deducted as the value of the property in the State bears to the entire estate. (See Laws of 1911.)

CORPORATIONS.—Corporations, in addition to tax on property, pay an annual license tax to the Secretary of State of fifteen dollars.

The operating value in the State of the property of interstate companies is assessed by the State Tax Commissioner through apportioning the State's part of the entire mileage; and this State value thus ascertained is apportioned to the counties wherein the lines are located. Private car companies pay a privilege tax to the State of 7 per cent of the gross receipts in the State as fixed by the State Tax Commissioner, and express companies 5 per cent. This is in addition to the tax on tangible property.

BANKS.—Bank stock is assessed where the bank does business less the assessed value of the real estate of the bank. Private banks are assessed on the general average of their borrowing capital.

EXEMPTIONS.—Exemptions, in addition to public property, also include mortgages, notes, State, county and city bonds, cemeteries, churches whose seats are free, property of Young Men's Christian Association, free public libraries, schools, and colleges with real estate not over ten acres which are open to all persons on equal terms; per-

sonal property of heads of families up to $300; fire companies and equipment, fruit trees not nursery stock and not forest trees artificially grown; ships, vessels and boats in actual construction; orphanages, reform institutions, homes for the aged and infirm, and hospitals.

ASSESSMENTS.—Real property is assessed biennially, subject, however, to readjustment as circumstances may require; and personal property, annually. By Act of 1913, the assessed value of all taxable property was fixed as not to exceed 50 per cent of its true value. As credits are not taxed there is now no deduction allowed for indebtedness owing. Money is held not to be exempt. See State *ex rel.* Wolfe v. Parmenter, 50 Wash. 164. The exemption of vessels was not sustained by the Supreme Court. See Pacific Cold Storage Co. v. Pierce Co., 85 Wash. 426; also Ridpath v. Spokane Co., 23 Wash. 426.

POLL TAXES.—There is no State poll tax, but a county poll tax of two dollars on males between 21 and 50, for road purposes. Cities may also levy an annual street poll tax, but not exceeding two dollars, payable in labor.

COUNTIES.—Counties levy no inheritance or special corporation taxes. The property included in the assessment and equalization is the same for county taxes as for the State.

COLLECTIONS.—Taxes are payable on or before March 15th, the collection beginning on the first Monday in February. Twelve months after the real estate taxes are due the certificate of delinquency bearing 12 per cent interest may be issued; and after three years such certificate may be foreclosed by plenary judicial proceeding. If such certificate of delinquency is not issued, the county treasurer may, after five years, issue a certificate of delinquency to the county which may then foreclose by such proceeding in court.

Taxes are a lien against the property, but not against the owner. Real estate may be redeemed before issue of tax deed on judgment in foreclosure. (See State Tax System of Washington by Professor Vandeveer Custis, published by University of Washington, Seattle, 1917.)

WEST VIRGINIA

(Constitution.)

Art. X, Sec. 1. Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but property

used for educational, literary, scientific, religious or charitable purposes; all cemeteries and public property may, by law, be exempted from taxation. The legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.

Sec. 2. The legislature shall levy an annual capitation tax of one dollar upon each male inhabitant of the State who has attained the age of twenty-one years, which shall be annually appropriated to the support of free schools. Persons afflicted with bodily infirmity may be exempted from this tax.

Sec. 5. The power of taxation of the legislature shall extend to provisions for the payment of the State debt and interest thereon, the support of free schools, the payment of the annual estimated expenses of the State; but whenever any deficiency in the revenue shall exist in any year, it shall, after regular session thereof held after the deficiency occurs, levy a tax for the ensuing year, sufficient with other sources of income to meet such deficiency as well as the estimated expenses of such year.

Sec. 9. The legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority levying the same.

(Statutory references following are to the West Virginia Code annotated 1906.)

ADMINISTRATION.—The Board of Public Works, consisting of certain elected State officials, assesses the operating property of public service corporations and apportion such assessments to the counties, and also equalizes assessments between the counties.

The State Tax Commissioner, appointed for a term of six years, assesses the inheritance tax, tabulates the returns submitted by public service or public utility corporations to the Board of Public Works and their assessments when required, and also inspects the work of local tax officials. The property of individuals and of corporations other than those assessed by the Board of Public Works is assessed by the local assessors. The essential features of the taxing system are first, the application of the general property tax practically to all classes of property; second, the assessment of public service corporations by the Board of Public Works and the State collection of the general property tax from such corporations for both State and local purposes.

RAILROADS.—Railroads pay for State and local purposes the general property tax on property not used in operation. In addition they pay also to the State for State purposes the capital stock or

annual license tax. Code, Secs. 1046-1048, as amended by Laws of 1909, Chap. 68. The assessment is made by valuing the railroad system as a unit as outlined in the railroad tax cases, 92 U. S. 608, *supra*, and ascertaining the proportion of the aggregate value located in the State, and this value is apportioned among the various counties through which the road operates. See Code, Sec. 768, as amended by Laws of 1909.

CAR COMPANIES.—Domestic and foreign car and pipe line companies and domestic express companies pay the general property tax, also the capital stock or annual license tax, and the foreign express companies pay a route mileage tax. Assessment is made in the same manner as that of railroads. Car line companies are assessed on the value of the average of cars used in the State.

PUBLIC UTILITIES.—Domestic, foreign, gas, water and electric light companies pay the general property tax on property used in operation, including franchise value, and in addition pay the State for State purposes the annual stock or annual license tax. Code, Sec. 1046, 1048, as amended, Laws 1909, Chap. 68. Assessment of the operating property of such companies is made by the Board of Public Works. Secs. 772-778, Laws of 1913, Chap 9.

CORPORATIONS.—Corporations are classified by statute as resident domestic who has its principal place of business or chief works in the State, and a non-resident corporation, whose principal place of business or chief works are located without the State.

Domestic and foreign corporations, except the public service corporations, pay locally the general property tax for State and local purposes. Domestic corporations pay in addition to the general property tax an annual license tax based on the authorized capital stock. Resident corporations pay an annual license tax which varies from $10 when the authorized capital stock is $5,000 or less, $170 when the authorized capital is $100,000, with $60 additional for each million additional capital stock. The non-resident corporations pay an annual license tax which varies from $15 when the authorized capital stock is $10,000 or less to $675 when the authorized capital stock is more than $4,000,000, but $50 additional tax on each million dollars authorized capital stock in excess of $4,000,000. See Code, Sec. 1048, as amended, Laws of 1909, Chap. 68.

BANKS.—The shares of stock of banks and financial institutions are assessed at their location to the several holders. The verified debts of shareholders may be deducted from their assessments.

FOREIGN CORPORATIONS.—Foreign corporations except express, telegraph and telephone companies owning lines in the State pay a license tax based on the proportion of the capital stock owned or used in the State. If the assessed value of the property amounts to $5000 or more the rates prescribed for resident corporations apply; but if the assessed value of the property in the State amounts to less than $5000, the rates prescribed for non-resident corporations apply. In any event the corporation must pay an annual license tax of not less than $100.

LICENSES.—Domestic and foreign manufacturing, mercantile, mining and miscellaneous corporations pay locally the general property tax, and in addition pay the State for State purposes the capital stock or annual license tax.

Domestic and foreign hydro-electric corporations pay in addition to the general property tax the capital stock or annual license tax and companies not selling power pay a license tax of 1/12 of 1 per cent per month upon their authorized capital. The total amount paid per annum cannot be less than $500 nor more than $5000. See Code, Sec. 760, 761, 1041, 1048, as amended, laws of 1909.

Toll and bridge companies are assessed locally as realty and ten times the annual rental value and in addition pay the State for State purposes the capital stock or annual license tax. Code, Sec. 760.

SPECIAL LAND TAX.—There is a special land tax of 5 cents on each acre of land where corporations own more than 10,000 acres of land. See Code, Sec. 1045.

INHERITANCE TAX.—There is a collateral inheritance tax regulated by the degree of sanguinity of the inheritor to the decedent. This relates to all property passing by inheritance in the State of West Virginia regardless of whether or not the decedent was a citizen or resident of said State. The State Tax Commissioner has general supervision of assessment and collection of the inheritance tax.

COLLECTIONS.—All taxes are assessed on the first day of April. Return of the value of property is made to the assessor who has the power to finally fix the value of such property for assessment. All taxes are payable to the sheriff on or before the 30th day of November of each year such taxes are levied. 10 per cent per annum is payable after the first day of January ensuing on any delinquent taxes. Taxes are a lien on all real estate from the first of April together with interest at the rate of 6 per cent per annum for the payment of said taxes. It seems that the county court sits as a court of equalization

and certifies the tax list to the Auditor of the State. Property may be sold for taxes by order of the Circuit Court or county court after the delinquent list has been published on the second Monday of December after such term of the proper county or Circuit Court. Property sold for taxes may be redeemed within a year.

WISCONSIN

(The Constitution.)

Art. VII, Sec. 1, as amended in 1908: The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall prescribe. Taxes may also be assessed on incomes, privileges and occupations, which taxes may be graduated, and progressive and reasonable exemptions may be provided.

ADMINISTRATION.—A State Tax Commission, composed of three commissioners appointed by the Governor, exercises wide supervisory powers over tax administration. As a Board of Assessment, it assesses the property of railroads and public utility companies; has the supervision and direction of the local assessors and local boards, and values the entire property in the State for the purpose of determining the proper valuation. The State Board also supervises the administration of the inheritance tax and the income tax, the latter through an income assessor and deputies in each of the counties, appointed through the State Civil Service Commission. The commission fixes the State rate on general property and recommends legislation.

RAILROADS.—Railroads are assessed by the State Tax Commission at the average rate of taxation for State purposes on what may be termed the operative property. The commission in valuing railroads, considers the system as an entirety as to both the tangible and intangible elements of value, and the proportion of the value of interstate properties pertaining to the State. This method of taxation was a substitute for the tax on gross earnings which was formerly in force. This "average rate of taxation" is determined by dividing the aggregate taxes levied on the general property in the State for all purposes by the true cash value of such property as ascertained by the commission, the quotient thus obtained constituting the average rate of taxation. (Laws of 1909, Ch. 53.) This tax is in lieu of other taxes on the property necessarily used in the operation of the corporate franchise. Terminals and warehouse property are taxed locally.

PUBLIC UTILITIES.—Substantially the same rule applies to the taxation of telegraph, express and car companies, water, gas, electricity, heat and power companies, all being assessed by the State Board at the average rate of taxation.

TELEPHONE COMPANIES.—Telephone companies are subject to the gross earnings tax of 5 per cent on gross receipts equaling $500,000, and four per cent when such receipts equal $300,000, but do not exceed $400,000. An additional tax equal to 5 cents on any telephone instrument owned and operated within the State is imposed on telephone companies when the total gross income tax paid by any person or company is less than 5 cents on each telephone instrument owned or operated within the State. (Laws of 1911, Ch. 651.)

WATER COMPANIES.—Dam and power companies organized for driving and storing logs operated in the navigable waters of the State pay the State for State purposes a tax of 2 per cent on their gross earnings, less deduction for taxes on such property as is used and assessed locally.

STREET RAILROADS.—Street railroads are assessed and taxed by the State at the average rate of taxation in substantially the same manner as railroad property. Electric light, heat and power companies are taxed in the same manner. The tax is paid to the State, 15 per cent being retained for State purposes, and the remaining eighty-five per cent distributed locally in proportion to the gross receipts from such companies.

VESSELS ON INTERNATIONAL WATERS.—Vessels owned within the State employed in interstate traffic in the navigation of international waters are subject, at the option of the owner, either to the general property tax, or to the tax of 3 cents per net ton of registered tonnage, in lieu of other taxes.

INSURANCE COMPANIES.—State life insurance companies, except fraternal societies and purely assessment companies, pay an annual license fee of 3 per cent upon the gross income from the State, except upon the real estate upon which the company pays taxes; while foreign life insurance companies pay an annual license fee of 3 per cent of gross premiums, except on real estate. Fire and marine insurance companies, other than domestic unions, pay an annual license fee of 4 per cent of the amount of gross premiums received, less reinsurance and cancellations. Fire insurance companies and agents are also subject to special charges in cities and villages for

the maintenance of fire departments. Casualty and surety insurance companies pay an annual license fee of 2 per cent upon gross premiums; also licenses in cities and towns for insurance agents. All other insurance companies, except domestic mutual companies pay an annual license fee of $300. As to annual licenses upon occupations, both State and local, see statutes.

MORTGAGES.—A mortgage is taxable as an interest in the real estate; but the mortgagor may in the deed elect to have assessed to him together with his own interest in the real estate, that of the mortgagee. Most mortgages executed in recent years contain this provision.

BANKS.—Shares of stock in incorporated banks and trust companies are taxed as personal property in the district where the bank is located. The real estate of banks is taxed as other real estate.

EXEMPTIONS.—Exemptions include public property, bonds of any county, city or municipal subdivision of the State, or school district, property of religious, scientific, literary or benevolent association used exclusively therefor, and real estate not exceeding ten acres, lands reserved as lands of a chartered college not exceeding forty acres, and parsonages whether occupied by the pastor permanently or rented for his benefit. The occasional leasing of such property does not render it liable for taxation. Endowment funds, public libraries, county agricultural societies, pensions of the United States, stock in any corporation which is required to pay taxes, growing crops, private libraries not exceeding in value $200; bicycles, sewing machines, firearms for the use of the owner not exceeding $25; sundry farm products and provisions and fuel provided by the head of the family to sustain its members for six months, not including any person paying board. (See Laws of 1911, Ch. 305.)

INHERITANCE TAX.—An inheritance tax is imposed on transfers by will or intestate laws on property within the State or within its jurisdiction when the deceased are residents or when they are nonresidents.

Property of the clear value of $10,000 is exempted to the widow and $2000 to a parent, child, husband or wife, or adopted child, and those in that class pay one per cent where the estate does not exceed $25,000, and the rates are graduated from one per cent up according to the degree of relationship and the amount of the inheritance.

Property transferred to municipal corporations and the State, or to

Wisconsin corporations, for religious, charitable or educational purposes used within the State, are exempted.

The inheritance tax is applicable to securities of corporations of the State, or of foreign corporations holding property within the State, transferred by non-resident decedents, but is proportioned to the value of the property of the corporation in this State. For information as to the assessment of the inheritance tax, address the Public Administrator of the county in which the estate is pending.

INCOME TAX.—The notable feature of the tax system of Wisconsin is the income tax, which is a substitute in great measure of the taxation of intangible securities, and was held valid by the Supreme Court of Wisconsin. (See Income Tax Cases, 148 Wis. 456.) This law specifically exempts from taxation: (a) money and credits; (b) stocks and bonds not otherwise specifically provided for; (c) personal ornaments and jewelry habitually worn; (d) household furnishings; (e) machinery, implements and tools used in farm or garden and (f) gold watch carried by the owner. The law allows, when the income tax is paid, that the same should be reduced by the amount paid on the personal property tax. This right of personal property offset is confined to the person or concern that owns the personal property assessed and is chargeable with the payment of both taxes. The effect is that the taxpayer has only to pay the larger of the two.

On the taxable income of individuals, families or co-partnerships, 1 per cent is levied on the first thousand dollars; one and one-quarter per cent on the second; one and one-half per cent on the third; one and three-quarter per cent on the fourth; two per cent on the fifth; two and one-half per cent on the sixth; three per cent on the seventh; three and one-half per cent on the eighth; four per cent on the ninth; four and one-half per cent on the tenth; five per cent on the eleventh; five and one-half per cent on the twelfth, and six per cent on all additional amounts.

Exemption of individual incomes is made of necessary expenses of less than $700, amount paid in taxes, life insurance received to $10,000, if the taxpayer was legally dependent on the decedent.

There is also an exception to an individual of $800, to husband and wife $1200, for each child under the age of 18 years, $200. For each additional person for whose support the taxpayer is legally liable, $200.

This income tax law applies to corporations as well as individuals, excepting, however, the corporations which are specifically taxed. Corporations are entitled to deduct all wages of employees and ex-

penses of conducting business, and for interest and depreciation, and also for losses actually sustained within the year and not compensated by insurance; any amount paid for taxes, or on dividends or income from other corporations, the income of which is assessed.

The corporation specifically assessed by payment of license fees directly in the State in lieu of taxes, such as railroad companies and public utility companies, insurance companies, etc., are not subject to this tax, but the public utilities taxed locally are not exempted.

COLLECTIONS.—Taxes are payable between the third Monday of December and the last Monday of the following January. Personal property is assessed as of the first day of May, the real estate at any time between said date and the last Monday in June of the year for which the tax is to be levied. Taxes not paid by the last Monday in January, are entered as delinquent. Taxes on personal property are collected by suit with interest at 12 per cent from the first day of January and the cost of collection. Lands upon which taxes remain unpaid are advertised and sold on the second Tuesday in June, for the tax with interest and costs. The purchaser is entitled to a deed three years from the sale if the land is not redeemed prior to that time by the payment to the county clerk of the amount, with 10 per cent interest and costs. Any interest of a minor may be redeemed from tax sales at any time before the expiration of one year after majority. That of any idiot or insane person, within five years after sale. Any part of the premises may be redeemed. (See Statutes, Secs. 1081 to 1170, R. S.)

WYOMING

Art. I, Sec. 28. All taxation shall be equal and uniform.

Art. XV, Sec. 3. All mines and mining claims from which gold, silver, and other precious metals, soda, saline, coal, mineral oil or other valuable deposit, is or may be produced, shall be taxed in addition to the surface improvements, and in lieu of taxes on the lands, on the gross product thereof, as may be prescribed by law; provided, that the product of all mines shall be taxed in proportion to the value thereof.

Sec. 5. (Requires the imposition of a poll tax for school purposes.)

Sec. 11. All property, except as in this Constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.

Sec. 12. The property of the United States, the State, counties, cities, towns, school districts, municipal corporations and public libraries, lots with the buildings thereon used exclusively for religious

worship, church parsonages, public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide.

Sec. 13. (Same as Iowa Const. 1857, Art. VII, Sec. 7.)

Sec. 14. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State or any county or other municipal corporation shall be a party.

ADMINISTRATION.—A Commissioner of Taxation is appointed by the Governor, who exercises general supervision over the administration of the assessment and tax laws and tax officials. The State Board of Equalization is composed of the Secretary of State, State Treasurer and State Auditor, who have power to equalize between the counties, but no power to equalize individual assessments. This board also assesses railroads, other public utilities and mines. The County Commissioners constitute a County Board of Equalization, with authority to equalize and correct assessments.

RAILROADS.—The property of railroad companies, telephone and telegraph companies is assessed by the State Board and the valuation apportioned to the various taxing districts. Express companies are taxed by the State 5 per cent on gross receipts in lieu of all other taxes. One-half is retained by the State for State uses, and the other half is apportioned to the counties.

INSURANCE COMPANIES.—Insurance companies pay 2½ per cent of the gross premium received from business in the State on the basis of annual reports to the Insurance Commissioner. This is in addition to the taxes on their real and personal property. One-half of this special tax is paid to the county.

CORPORATIONS.—Corporations, whether domestic or foreign, are taxed upon their property under the General property tax. By Act of 1913, corporations were subjected to an occupation tax, varying from $10.00 to $25.00. Shares of both domestic and foreign corporations are not taxed, while bonds are taxable.

Public utility corporations are also taxed locally under the general property tax.

BUSINESS.—Business corporations, that is, manufacturing, mercantile and mining companies, pay the general property tax. Manufacturing companies are assessed on the estimated yearly average value of material and mercantile companies on the yearly average value of merchandise.

BANKS.—Shares of stock in national banks are assessed to the owner at their par value. The capital and surplus of State banks are assessed, the amount invested in real estate being deducted from the amount of capital invested.

POLL TAX.—There is no State poll tax, but under the Constitution each county levies a poll tax of two dollars on every male between 21 and 50 for school purposes. There may also be levied an additional tax on males between 21 and 50 for road purposes, which may be worked out.

INHERITANCE TAX.—The inheritance tax exempts life estates to beneficiaries of the first-class, and also the sum of $10,000 of each bequest, and the rate is 2 per cent, while in the case of other beneficiaries, the rate is 5 per cent, and $500.00 is exempt. The entire receipts from inheritance tax imposed by the State, are retained by the county in which collected and are used exclusively for county roads. The tax is imposed upon all property passing by will or intestate laws and on all property in the State of a non-resident.

ASSESSMENTS.—There is one assessment list for State and county taxes and another for city and town taxes. The basis of assessment is the actual or full cash market value to April 1st. *Bona fide* debts may be deducted from credits, except notes given as premiums of insurance, unpaid subscriptions to institutions or societies, or unpaid subscriptions for capital stock.

LIVE STOCK.—Live stock is taxed at the *situs* of its "home range." Before cattle are brought into the State, notice of intention to bring them into the State must be filed ten days prior to the shipment, to the assessor of the county to which it is proposed to bring such live stock. Live stock driven into the State prior to the last day of the year, which remains for a period of not less than thirty days, is assessed in the same manner as if it had been in the county at the time of the annual assessment, provided it has not been assessed in some other county for that year. A reciprocity tax is levied on live stock belonging in another State, but which grazes part of the year in Wyoming.

OIL WELLS.—Mines and oil wells, whether in operation or not, are assessed and taxed separately from surface values.

WORKMEN'S COMPENSATION.—Under recent amendment to the State Constitution, all employments designated by the legislature as extra hazardous employments, are taxed at graduated rates for the

purpose of creating a fund for compensating workingmen for injuries and their heirs for death caused in such employment. See Sec. 473, *supra*, as to U. S. Sup. Court on constitutionality of this law.

EXEMPTIONS.—Exemptions in addition to public property, are public libraries and property held for charitable uses, churches, parsonages, family bibles, pictures and school books, household and kitchen furniture, food for each family not to exceed $500, property used in the manufacture of beet sugar in the State for a period of ten years where 75 per cent of the beets used are grown in the State; pensions, salaries and payment for services expected to be rendered, all mortgages upon property within the State, whether real or chattel, together with the indebtedness thereby secured, provided that the mortgaged property, whether real or personal, is taxed at its true value. State, county, municipal and school district bonds owned by residents of the State are also exempt.

COLLECTION.—Taxes are due and payable, without demand, after the third Monday in September. After December 31st, all unpaid taxes are delinquent. A penalty of 8 per cent is added, and the whole draws interest from that date; and taxes are a lien from that date. Delinquent taxes are collected by distress and sale.

Real estate may be sold for taxes, after advertisement, subject to right of redemption within three years on payment of amount due, with 15 per cent added and 10 per cent interest from date of sale, and any subsequent taxes paid by purchaser, who receives a certificate of purchase at time of sale, and if no redemption a deed at end of three years.

THE FEDERAL SYSTEM OF INTERNAL TAXATION.

The Federal system of internal taxation, that is, other than customs duties, has been enormously expanded in recent years, and especially since the adoption of the Sixteenth Amendment in 1913. As already shown (Chapter XVII) the taxing power of the United States, based on the express or implied grants of the Constitution is only qualified as to direct taxation with reference to the general ownership of property; and the important statutes are, first, the Income Tax, first enacted October 3, 1913, and then re-enacted in the General Revenue Act of September 3, 1916, and extensively amended by what is known as the "War Revenue Act" of October 3, 1917. For convenience of reference this Income Tax Act is printed with the amendments of the Act of 1917 incorporated in the respective sections. Prior to the adoption of the Sixteenth Amendment, Congress in 1909 enacted what was termed a Corporation Excise Tax Law, which was in effect an income tax assessed upon corporations doing business. This act was construed in a number of opinions by the Supreme Court and the other Federal Courts, and references have been made thereto where they seemed applicable to the corresponding sections in the Income Tax Law. (See *supra,* Sec. 561.)

This Revenue Act of September, 1916, included also an Estate or Inheritance Tax, and this again was amended by the Act of March 3, 1917, and again amended and the rates increased by the Act of October 3, 1917. The rates fixed by these successive acts have been tabulated, showing the dates when each of these schedules of rates is applicable.

The Act of October 3, 1917, though entitled, "An Act to Provide Revenue to Defray War Expenses and for Other Purposes," is not limited by its terms to the duration of the war; so that

its duration will depend upon the future legislation of Congress.[1]

These Acts, particularly the War Revenue Act of 1917, are very interesting illustrations of the vast scope of the Federal taxing power. Though the General Property Tax, based on the ownership of real and personal property, which is the main support of nearly all the State governments, is not available for the general government on account of the constitutional limitation as to direct taxation, this Federal power is not limited by State lines and is restrained only by the requirement of geographical uniformity, and in this "war revenue" Act extends to all the business and commercial activities of the people, whether individual or corporate.

[1] It should be noted that the provision in the act limiting the taxes therein imposed to the present war, was stricken out.

THE INCOME TAX.

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ACT OF SEPTEMBER 8, 1916, AS AMENDED BY ACT OF OCTOBER 3, 1917.

[PUBLIC—No. 271—64TH CONGRESS.]

[H. R. 16763.]

An Act to increase the revenue, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.—INCOME TAX.

(Sections amended, or new sections added by War Revenue Act of Oct. 3, 1917, are enclosed in brackets.)

PART I.—ON INDIVIDUALS.

SEC. 1. (a) That there shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax of two per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources within the United States by every individual, a non-resident alien, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise.

(b) In addition to the income tax imposed by subdivision (a) of this section (herein referred to as the normal tax) there shall be levied, assessed, collected, and paid upon the total net income of every individual, or, in the case of a non-resident alien, the total net income received from all sources within the United States, an additional income tax (herein referred to as the additional tax) of one per centum per annum upon the amount by which such total net income exceeds $20,000 and does not exceed $40,000, two per centum per annum upon the amount by which such total net income exceeds $40,000 and does not exceed $60,000, three per centum per annum upon the amount by which such total net income exceeds $60,000 and does not exceed $80,000, four per centum per annum upon the amount by which such total net income exceeds $80,000 and does not exceed $100,000, five per centum per annum upon the amount by which such total net income exceeds $100,000 and does not exceed $150,000, six per centum per annum upon the amount by which such total net income exceeds $150,000, and does not exceed $200,000, seven per centum per annum upon the amount by which such total net income exceeds $200,000 and does not exceed $250,000, eight per centum per annum upon the amount by which such total net income exceeds $250,000 and does not exceed $300,000, nine per centum per

[Amendments of October 3, 1917, included in Brackets]

annum upon the amount by which such total net income exceeds $300,000 and does not exceed $500,000, ten per centum per annum upon the amount by which such total net income exceeds $500,000, and does not exceed $1,000,000, eleven per centum per annum upon the amount by which such total net income exceeds $1,000,000 and does not exceed $1,500,000, twelve per centum per annum upon the amount by which such total net income exceeds $1,500,000 and does not exceed $2,000,000, and thirteen per centum per annum upon the amount by which such total net income exceeds $2,000,000.

For the purpose of the additional tax there shall be included as income the income derived from dividends on the capital stock or from the net earnings of any corporation, joint-stock company or association, or insurance company, except that in the case of non-resident aliens such income derived from sources without the United States shall not be included.

All the provisions of this title relating to the normal tax on individuals, so far as they are applicable and are not inconsistent with this subdivision and section three, shall apply to the imposition, levy, assessment, and collection of the additional tax imposed under this subdivision.

(c) The foregoing normal and additional tax rates shall apply to the entire net income, except as hereinafter provided, received by every taxable person in the calendar year nineteen hundred and sixteen and in each calendar year thereafter.

INCOME DEFINED.[1]

[Sec. 2. (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or

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[1] For decisions of the Supreme Court sustaining the constitutionality of the corporation excise tax of 1909 prior to the adoption of the 16th amendment, and also the income tax of 1913 upon which the act of 1916 and also the acts of 1917 are based, see Secs. 562 and 563, *supra*.

On the fundamental question as to what is income as distinguished from capital, see Lynch v. Turrish, 236 Fed. 653 (1916); construing the act of 1913, where the Circuit Court of Appeals of the 8th Circuit held that the enhanced value of timber lands held by a corporation, which accrued from the gradual increase of values during years prior to the enactment of the act of 1913, although distributed subsequent to that date, did not become income under that act, but was an increase of capital assets, and that advance of the value of property does not of itself constitute income.

As to timber lands, see also concluding remarks of opinion of Supreme Court in the Sargeant Land Co. case, 242 U. S. ——, see *infra* p. 967, 61 L. Ed. p. ——. See also Gray v. Darlington, 15 Wall, 63, 21 L. Ed. 45 (1872), construing income tax law of 1867. See also United States v. Guggenheim Exploration Co., So. D. of N. Y., 238 Fed. 231 (1917), construing the corporation excise Tax of 1909.

[Amendments of October 3, 1917, included in Brackets]

compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.]

(b) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: *Provided*, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.

Such trustees, executors, administrators, and other fiduciaries are hereby idemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries.

(c) For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived.[1]

ADDITIONAL TAX INCLUDES UNDISTRIBUTED PROFITS.

Sec. 3. For the purpose of the additional tax, the taxable income of any individual shall include the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies of associations, or insurance companies, however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation, joint-stock company or association, or insurance company, is a mere holding

[1] See Lynch v. Turrish, 236 Fed. 653, *supra*.

[Amendments of October 3, 1917, included in Brackets]

company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business, shall be *prima facie* evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business. When requested by the Commissioner of Internal Revenue, or any district collector of internal revenue, such corporation, joint-stock company or association, or insurance company shall forward to him a correct statement of such gains and profits and the names and addresses of the individuals or shareholders who would be entitled to the same if divided or distributed.

[Sec. 4. The following income shall be exempt from the provisions of this title:

The proceeds of life insurance policies paid to individual beneficiaries upon the death of the insured; the amount received by the insured, as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract; the value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included as income); interest upon the obligations of a State or any political subdivision thereof or upon the obligations of the United States (but, in the case of obligations of the United States issued after September first, nineteen hundred and seventeen, only if and to the extent provided in the Act authorizing the issue thereof) or its possessions or securities issued under the provisions of the Federal Farm Loan Act of July seventeenth, nineteen hundred and sixteen; the compensation of the present President of the United States during the term for which he has been elected and the judges of the supreme and inferior courts of the United States now in office, and the compensation of all officers and employees of a State, or any political subdivision thereof, except when such compensation is paid by the United States Government.]

DEDUCTIONS ALLOWED.

Sec. 5. That in computing net income in the case of a citizen or resident of the United States—

(a) For the purpose of the tax there shall be allowed as deductions—

First. The necessary expenses actually paid in carrying on any business or trade, not including personal, living, or family expenses;

[Second. All interest paid within the year on his indebtedness except on indebtedness incurred for the purchase of obligations or securities the interest upon which is exempt from taxation as income under this title;

[Amendments of October 3, 1917, included in Brackets]

Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes) or of its territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits;]

Fourth. Losses actually sustained during the year, incurred in his business or trade, or arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise: *Provided*, That for the purpose of ascertaining the loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such loss sustained;

Fifth. In transactions entered into for profit but not connected with his business or trade, the losses actually sustained therein during the year to an amount not exceeding the profits arising therefrom;

Sixth. Debts due to the taxpayer actually ascertained to be worthless and charged off within the year;

Seventh. A reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade;

Eighth. (a) In the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof, which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That when the allowances authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made. No deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made.

[Ninth. Contributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes, or to societies for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockholder or individual, to an amount not in excess of fifteen per cent of the tax-

[Amendments of October 3, 1917, included in Brackets]

payer's taxable net income as computed without the benefit of this paragraph, such contributions or gifts shall be allowed as deductions only if verified under rules and regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.]

CREDITS ALLOWED.

(b) For the purpose of the normal tax only, the income embraced in a personal return shall be credited with the amount received as dividends upon the stock or from the net earnings of any corporation, joint-stock company or association, trustee, or insurance company, which is taxable upon its net income as hereinafter provided;

(c) A like credit shall be allowed as to the amount of income, the normal tax upon which has been paid or withheld for payment at the source of the income under the provisions of this title.

NON-RESIDENT ALIENS

Sec. 6. That in computing net income in the case of a non-resident alien—

(a) For the purpose of the tax there shall be allowed as deductions—

First. The necessary expenses actually paid in carrying on any business or trade conducted by him within the United States, not including personal, living, or family expenses;

[Second. The proportion of all interest paid within the year by such person on his indebtedness (except on indebtedness incurred for the purchase of obligations or securities the interest upon which is exempt from taxation as income under this title) which the gross amount of his income for the year derived from sources within the United States bears to the gross amount of his income for the year derived from all sources within and without the United States, but this deduction shall be allowed only if such person includes in the return required by section eight all the information necessary for its calculation;

Third. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes), or of its territories, or possessions, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, paid within the United States, not including those assessed against local benefits;]

Fourth. Losses actually sustained during the year, incurred in business or trade conducted by him within the United States, and losses of property within the United States arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise: *Provided*, That for the purpose of ascertaining the amount of such loss or losses sustained in trade, or speculative transactions not in trade, from the same or

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any kind of property acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such loss or losses sustained;

Fifth. In transactions entered into for profit but not connected with his business or trade, the losses actually sustained therein during the year to an amount not exceeding the profits arising therefrom in the United States;

Sixth. Debts arising in the course of business or trade conducted by him within the United States due to the taxpayer actually ascertained to be worthless and charged off within the year;

Seventh. A reasonable allowance for the exhaustion, wear and tear of property within the United States arising out of its use or employment in the business or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made. No deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made.

[(c) A non-resident alien individual shall receive the benefit of the deductions and credits provided for in this section only by filing or causing to be filed with the collector of internal revenue a true and accurate return of his total income, received from all sources, corporate or otherwise, in the United States, in the manner prescribed by this title; and in case of his failure to file such return the collector shall collect the tax on such income, and all property belonging to such non-resident alien individual shall be liable to distraint for the tax.]

[Sec. 7. That for the purpose of the normal tax only, there shall be allowed as an exemption in the nature of a deduction from the amount of the net income of each citizen or resident of the United States, ascertained as provided herein, the sum of $3,000, plus $1,000 additional if the person making the return be a head of a family or a married man with a wife living with him, or plus the sum of $1,000 additional if the person making the return be a married woman with a husband living with her; but in no event shall this additional exemption of

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$1,000 be deducted by both a husband and a wife: *Provided*, That only one deduction of $4,000 shall be made from the aggregate income of both husband and wife when living together: *Provided further*, That if the person making the return is the head of a family there shall be an additional exemption of $200 for each child dependent upon such person; if under eighteen years of age, or if incapable of self-support because mentally or physically defective, but this provision shall operate only in the case of one parent in the same family: *Provided further*, That guardians or trustees shall be allowed to make this personal exemption as to income derived from the property of which such guardian or trustee has charge in favor of each ward or *cestui que* trust: *Provided further*, That in no event shall a ward or *cestui que* trust be allowed a greater personal exemption than as provided in this section from the amount of net income received from all sources. There shall also be allowed an exemption from the amount of the net income of estates of deceased citizens or residents of the United States during the period of administration or settlement, and of trust or other estates of citizens or residents of the United States the income of which is not distributed annually or regularly under the provisions of subdivision (b) of section two, the sum of $3,000, including such deductions as are allowed under section five.]

RETURNS.

Sec. 8. (a) The tax shall be computed upon the net income, as thus ascertained, of each person subject thereto, received in each preceding calendar year ending December thirty-first.

(b) On or before the first day of March, nineteen hundred and seventeen, and the first day of March in each year thereafter, a true and accurate return under oath shall be made by each person of lawful age, except as hereinafter provided, having a net income of $3,000 or over for the taxable year to the collector of internal revenue for the district in which such person has his legal residence or principal place of business, or if there be no legal residence or place of business in the United States, then with the collector of internal revenue at Baltimore, Maryland, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth specifically the gross amount of income from all separate sources, and from the total thereof deducting the aggregate items of allowances herein authorized: *Provided*, That the Commissioner of Internal Revenue shall have authority to grant a reasonable extension of time, in meritorious cases, for filing returns of income by persons residing or traveling abroad who are required to make and file returns of income and who are unable to file said returns on or before March first of each year: *Provided further*, That the aforesaid return may be made by an agent when by reason of illness, absence, or non-residence the person liable for said return is unable to make and render the same, the agent assuming the responsibility of making the return and incurring penalties provided for erroneous, false, or fraudulent return.

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[(c) Guardians, trustees, executors, administrators, receivers, conservators, and all persons, corporations, or associations, acting in any fiduciary capacity, shall make and render a return of the income of the person, trust, or estate for whom or which they act, and be subject to all the provisions of this title which apply to individuals. Such fiduciary shall make oath that he has sufficient knowledge of the affairs of such person, trust, or estate to enable him to make such return and that the same is, to the best of his knowledge and belief, true and correct, and be subject to all the provisions of this title which apply to individuals: *Provided*, That a return made by one or two or more joint fiduciaries filed in the district where such fiduciary resides, under such regulations as the Secretary of the Treasury may prescribe, shall be a sufficient compliance with the requirements of this paragraph: *Provided further*, That no return of income not exceeding $3,000 shall be required except as in this title otherwise provided.]

(Subdivision (d) providing for withholding and payment at source of amount of normal tax from payments to tax payer was repealed by act of October 3, 1917.)

[(e) Persons carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of the partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid under the provisions of this title: *Provided*, That from the net distributive interests on which the individual members shall be liable for tax, normal and additional, there shall be excluded their proportionate shares received from interest on the obligations of a State or any political or taxing subdivision thereof, and upon the obligations of the United States (if and to the extent that it is provided in the Act authorizing the issue of such obligations of the United States that they are exempt from taxation) and its possessions, and that for the purpose of computing the normal tax there shall be allowed a credit, as provided by section five, subdivision (b), for their proportionate share of the profits derived from dividends. Such partnership, when requested by the Commissioner of Internal Revenue or any district collector, shall render a correct return of the earnings, profits, and income of the partnership, except income exempt under section four of this Act, setting forth the item of the gross income and the deductions and credits allowed by this title, and the names and addresses of the individuals who would be entitled to the net earnings, profits, and income, if distributed. A partnership shall have the same privilege of fixing and making returns upon the basis of its own fiscal year as is accorded to corporations under this title. If a fiscal year ends during nineteen hundred and sixteen or a subsequent calendar year for which there is a rate of tax different from the rate for the preceding calendar year, then (1) the rate for such preceding calendar year shall apply to an amount of each partner's share of such partnership profits equal to the proportion which the part of such fiscal year falling within such calendar year bears to the

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full fiscal year, and (2) the rate for the calendar year during which such fiscal year ends shall apply to the remainder.]

(f) In every return shall be included the income derived from dividends on the capital stock or from the net earnings of any corporation, joint-stock company or association, or insurance company, except that in the case of non-resident aliens such income derived from sources without the United States shall not be included.

(g) An individual keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect his income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make his return upon the basis upon which his accounts are kept, in which case the tax shall be computed upon his income as so returned.

ASSESSMENT AND ADMINISTRATION.

Sec. 9. (a) That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said amounts shall be paid on or before the fifteenth day of June, except in cases of refusal or neglect to make such return and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, or has been made, make a return upon information obtained as provided for in this title or by existing law, or require the necessary corrections to be made, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the fifteenth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of five per centum on the amount of tax unpaid, and interest at the rate of one per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons.[1]

[(b) All persons, corporations, partnerships, associations, and insurance companies, in whatever capacity acting, including lessees or mort-

[1] In U. S. v. General Inspection & Loading Co., 204 Fed. 657 (1913), District of N. J., it was held that under the Corporate Excise Law, which contained a similar provision for giving notice of the assessment to the corporation, this notice could be lawfully given by mail; and a notice so sent by the Collector, in a franked envelope, bearing the return card, was presumptively received, and the burden was upon the corporation to prove to the contrary to avoid the penalty for nonpayment, following the general rule declared in Rosenthal v. Walker, 111 U. S. 185, 28 L. Ed. 395 (1884).

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gagors of real or personal property, trustees acting in any trust capacity, executors, administrators, receivers, conservators, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual or periodical gains, profits, and income of any non-resident alien individual, other than income derived from dividends on capital stock, or from the net earnings of a corporation, joint-stock company or association, or insurance company, which is taxable upon its net income as provided in this title, are hereby authorized and required to deduct and withhold from such annual or periodical gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this title, and shall make returns thereof on or before March first of each year and, on or before the time fixed by law for the payment of the tax, shall pay the amount withheld to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax, and they are each hereby indemnified against every person, corporation, partnership, association, or insurance company, or demand whatsoever for all payments which they shall make in pursuance and by virtue of this title.]

[(c) The amount of the normal tax hereinbefore imposed shall also be deducted and withheld from fixed or determinable annual or periodical gains, profits, and income derived from interest upon bonds and mortgages, or deeds of trust or other similar obligations of corporations, joint-stock companies, associations, and insurance companies (if such bonds, mortgages, or other obligations contain a contract or provision by which the obligor agrees to pay any portion of the tax imposed by this title upon the obligee or to reimburse the obligee for any portion of the tax or to pay the interest without deduction for any tax which the obligor may be required or permitted to pay thereon or to retain therefrom under any law of the United States), whether payable annually or at shorter or longer periods and whether such interest is payable to a non-resident alien individual or to an individual citizen or resident of the United States, subject to the provisions of the foregoing subdivision (b) of this section requiring the tax to be withheld at the source and deducted from annual income, and returned and paid to the Government, unless the person entitled to receive such interest shall file with the withholding agent, on or before February first, a signed notice in writing claiming the benefit of an exemption under section seven of this title.]

(Subdivisions (d) and (e) providing for withholding and payment at source of amount of normal tax from payments of interest upon foreign securities also repealed by act of October 3, 1917.)

[(f) All persons, corporations, partnerships, or associations, undertaking as a matter of business or for profit the collection of foreign payments of interest or dividends by means of coupons, checks, or bills

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of exchange shall obtain a license from the Commissioner of Internal Revenue, and shall be subject to such regulations enabling the Government to obtain the information required under this title, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and whoever knowingly undertakes to collect such payments as aforesaid without having obtained a license therefor, or without complying with such regulations, shall be deemed guilty of a misdemeanor and for each offense be fined in a sum not exceeding $5,000, or imprisoned for a term not exceeding one year, or both, in the discretion of the court.

(g) The tax herein imposed upon gains, profits, and incomes not falling under the foregoing and not returned and paid by virtue of the foregoing or as otherwise provided by law shall be assessed by personal return under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury. The intent and purpose of this title is that all gains, profits, and income of a taxable class, as defined by this title, shall be charged and assessed with the corresponding tax, normal and additional, prescribed by this title, and said tax shall be paid by the owner of such income, or the proper representative having the receipt, custody, control, or disposal of the same. For the purpose of this title ownership or liability shall be determined as of the year for which a return is required to be rendered.

The provisions of this section, except Subdivision C, relating to the deduction and payment of the tax at the source of income shall only apply to the normal tax hereinbefore imposed upon non-resident alien individuals.]

PART II—ON CORPORATIONS.

[Sec. 10. (a) That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized, but not including partnerships, a tax of two per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources within the United States by every corporation, joint-stock company or association, or insurance company, organized, authorized, or existing under the laws of any foreign country, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, and including the income derived from dividends on capital stock or from net earnings of resident corporations, joint-stock companies or associations, or insurance companies, whose net income is taxable under this title.[1]

[1] As to the determination of what is corporate income as distinguished from capital, see Lynch v. Turrish, 236 Fed. 653, *supra*, p. 954.

[Amendments of October 3, 1917, included in Brackets]

(b) In addition to the income tax imposed by subdivision (a) of this section there shall be levied, assessed, collected, and paid annually an additional tax of ten per centum upon the amount, remaining undistributed six months after the end of each calendar or fiscal year, of the total net income of every corporation, joint-stock company or association, or insurance company, received during the year, as determined for the purposes of the tax imposed by such subdivision (a), but not including the amount of any income taxes paid by it within the year imposed by the authority of the United States.

The tax imposed by this subdivision shall not apply to that portion of such undisputed net income which is actually invested and employed in the business or is retained for employment in the reasonable requirements of the business, or is invested in obligations of the United States issued after September first, nineteen hundred and seventeen: *Provided*, That if the Secretary of the Treasury ascertains and finds that any portion of such amount so retained at any time for employment in the business is not so employed or is not reasonably required in the business a tax of fifteen per centum shall be levied, assessed, collected, and paid thereon.

The foregoing tax rates shall apply to the undistributed net income received by every taxable corporation, joint-stock company or association, or insurance company in the calendar year nineteen hundred and seventeen and in each year thereafter, except that if it has fixed its own fiscal year under the provisions of existing law, the foregoing rates shall apply to the proportion of the taxable undistributed net income returned for the fiscal year ending prior to December thirty-first, nineteen hundred and seventeen, which the period between January first, nineteen hundred and seventeen, and the end of such fiscal year bears to the whole of such fiscal year.]

CONDITIONAL AND OTHER EXEMPTIONS.

Sec. 11. (a) That there shall not be taxed under this title any income received by any—

First. Labor, agricultural, or horticultural organization;

Second. Mutual savings bank not having a capital stock represented by shares;

Third. Fraternal beneficiary society, order, or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents;

Fourth. Domestic building and loan association and coöperative banks without capital stock organized and operated for mutual purposes and without profit;

Fifth. Cemetery company owned and operated exclusively for the benefit of its members;

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Sixth. Corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual;

Seventh. Business league, chamber of commerce, or board of trade, not organized for profit and no part of the net income of which inures to the benefit of any private stockholder or individual;

Eighth. Civic league or organization not organized for profit but operated exclusively for the promotion of social welfare;

Ninth. Club organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net income of which inures to the benefit of any private stockholder or member;

Tenth. Farmers' or other mutual hail, cyclone, or fire insurance company, mutual ditch or irrigation company, mutual or coöperative telephone company, or like organization of a purely local character, the income of which consists solely of assessments, dues, and fees collected from members for the sole purpose of meeting its expenses;

Eleventh. Farmers,' fruit growers,' or like association, organized and operated as a sales agent for the purpose of marketing the products of its members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them;

Twelfth. Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this title; or

Thirteenth. Federal land banks and national farm-loan associations as provided in section twenty-six of the Act approved July seventeenth, nineteen hundred and sixteen, entitled "An Act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create Government depositaries and financial agents for the United States, and for other purposes."

Fourteen. Joint-stock land banks as to income derived from bonds or debentures of other joint-stock land banks or any Federal land bank belonging to such joint-stock land bank.

(b) There shall not be taxed under this title any income derived from any public utility or from the exercise of any essential governmental function accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, nor any income accruing to the government of the Philippine Islands or Porto Rico, or of any political subdivision of the Philippine Islands or Porto Rico: *Provided*, That whenever any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, has, prior to the passage of this title, entered in good faith into a contract with any person or corporation, the object and pur-

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pose of which is to acquire, construct, operate, or maintain a public utility, no tax shall be levied under the provisions of this title upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such State, Territory, or the District of Columbia, or a political subdivision of a State or Territory; but this provision is not intended to confer upon such person or corporation any financial gain or exemption or to relieve such person or corporation from the payment of a tax as provided for in this title upon the part or portion of the said income to which such person or corporation shall be entitled under such contract.

DEDUCTIONS.

Sec. 12. (a) In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity.[1]

Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade: (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines [2]

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[1] The determination of what are proper expenses to be deducted from gross income was discussed in the construction of the corporation excise tax law of 1909, which was in effect an income tax levied upon corporations doing business, see Baldwin Locomotive Works v. McCosh, 221 Fed. 59 (1915), C. C. A. 3rd Circuit; Conn. Mut. Life Ins. Co. v. Eaton, 218 Fed. 206; Middlesex Banking Co. v. Eaton, Collector, 221 Fed. 86; Herrold v. Mut. Benefit Life Ins. Co., 201 Fed. 918, C. C. A. 3rd Circuit.

[2] In Von Baumbach v. Sargeant Land Co., 242 U. S. ——, 61 L. Ed. ——, (January, 1917), the Court reversed the C. C. A., 8th Circuit, in 219 Fed. 231, and held that the so-called royalty received by the corporate owners of land leased for long terms, for the purpose of mining merchantable iron ore, to persons who agreed to pay monthly a specified sum per ton for all ore mined and shipped the previous month, was an income under the Corporation Tax Law of 1909, which imposed a tax measure by annual income upon doing business in a corporate capacity. The Court held also that the exhaustion of the ore body resulting from the process of mining, was not an element to be considered in determining the reasonable depreciation which, under the Act of 1909, was to be deducted from the annual income

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a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made; and (c) in the case of insurance companies, the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided*, That no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made: *Provided further*, That mutual fire and mutual employers' liability and mutual workmen's compensation and mutual casualty insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further*, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof, and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year;

Third. The amount of interest paid within the year on its indebtedness (except on indebtedness incurred for the purchase of obligations or securities the interest upon which is exempt from taxation as income under this title) to an amount of such indebtedness not in excess of the sum of (a) the entire amount of the paid-up capital stock outstanding at the close of the year, or, if no capital

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of a corporate miner. The Court, however, recognized in the opinion that Congress had realized the equitable considerations requiring an allowance both in the Act of 1913 and in the Act of 1916, but had not done so in the Act of 1909.

[Amendments of October 3, 1917, included in Brackets]

stock, the entire amount of capital employed in the business at the close of the year, and (b) one-half of its interest-bearing indebtedness then outstanding: *Provided*, That for the purpose of this title preferred capital stock shall not be considered interest-bearing indebtedness, and interest or dividends paid upon this stock shall not be deductible from gross income: *Provided further*, That in cases wherein shares of capital stock are issued without par or nominal value, the amount of paid-up capital stock, within the meaning of this section, as represented by such shares, will be the amount of cash, or its equivalent, paid or transferred to the corporation as a consideration for such shares: *Provided further*, That in the case of indebtedness wholly secured by property collateral, tangible or intangible, the subject of sale or hypothecation in the ordinary business of such corporation, joint-stock company or association as a dealer only in the property constituting such collateral, or in loaning the funds thereby procured, the total interest paid by such corporation, company, or association within the year on any such indebtedness may be deducted as a part of its expenses of doing business, but interest on such indebtedness shall only be deductible on an amount of such indebtedness not in excess of the actual value of such property collateral: *Provided further*, That in the case of bonds or other indebtedness, which have been issued with a guaranty that the interest payable thereon shall be free from taxation, no deduction for the payment of the tax herein imposed, or any other tax paid pursuant to such guaranty, shall be allowed; and in the case of a bank, banking association, loan or trust company, interest paid within the year on deposits or on moneys received for investment and secured by interest-bearing certificates of indebtedness issued by such bank, banking association, loan or trust company shall be deducted;

Fourth. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes), or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits.[1]

(b) In the case of a corporation, joint-stock company or association, or insurance company, organized, authorized, or existing under the laws of any foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources within the United States—

First. All the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States, including rentals

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[1] It was held in Elliott Nat'l Bank v. Gill, C. C. A. 1st Circuit, 218 Fed. 933, under the corporation tax act of 1909, that a national bank was not authorized to deduct taxes assessed against its stockholders which it had paid in the first instance for the stockholders.

[Amendments of October 3, 1917, included in Brackets]

or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity.

Second. All losses actually sustained within the year in business or trade conducted by it within the United States and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; (a) and in the case (a) of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made; and (c) in the case of insurance companies, the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided*, That no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate, and no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made: *Provided, further*, That mutual fire and mutual employers' liability and mutual workmen's compensation and mutual casualty insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further*, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment thereof and the payment thereof, and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year;

[Amendments of October 3, 1917, included in Brackets]

[Third. The amount of interest paid within the year on its indebtedness (except on indebtedness incurred for the purchase of obligations or securities the interest upon which is exempt from taxation as income under this title) to an amount of such indebtedness not in excess of the proportion of the sum of (a) the entire amount of the paid-up capital stock outstanding at the close of the year, or, if no capital stock, the entire amount of the capital employed in the business at the close of the year, and (b) one-half of its interest-bearing indebtedness then outstanding, which the gross amount of its income for the year from business transacted and capital invested within the United States bears to the gross amount of its income derived from all sources within and without the United States: *Provided*, That in the case of bonds or other indebtedness which have been issued with a guaranty that the interest payable thereon shall be free from taxation, no deduction for the payment of the tax herein imposed or any other tax paid pursuant to such guaranty shall be allowed; and in case of a bank, banking association, loan or trust company, or branch thereof, interest paid within the year on deposits by or on moneys received for investment from either citizens or residents of the United States and secured by interest-bearing certificates of indebtedness issued by such bank, banking association, loan or trust company, or branch thereof;

Fourth. Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes), or of its Territories, or possessions, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, paid within the United States, not including those assessed against local benefits.]

(c) In the case of assessment insurance companies, whether domestic or foreign, the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guarantee or reserve funds shall be treated as being payments required by law to reserve funds.

RETURNS.

Sec. 13. (a) The tax shall be computed upon the net income, as thus ascertained, received within each preceding calendar year ending December thirty-first: *Provided*, That any corporation, joint-stock company or association, or insurance company, subject to this tax, may designate the last day of any month in the year as the day of the closing of its fiscal year and shall be entitled to have the tax payable by it computed upon the basis of the net income ascertained as herein provided for the year ending on the day so designated in the year preceding the date of assessment instead of upon the basis of the net income for the calendar year preceding the date of assessment; and it shall give notice of the day it has thus designated as the closing of its fiscal year to the collector of the district in which its principal business office is located at any time not less than thirty

[Amendments of October 3, 1917, included in Brackets]

days prior to the first day of March of the year in which its return would be filed if made upon the basis of the calendar year;

(b) Every corporation, joint-stock company or association, or insurance company, subject to the tax herein imposed, shall, on or before the first day of march, nineteen hundred and seventeen, and the first day of March in each year thereafter, or, if it has designated a fiscal year for the computation of its tax, then within sixty days after the close of such fiscal year ending prior to December thirty-first, nineteen hundred and sixteen, and the close of each such fiscal year thereafter, render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice-president, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office of the corporation, company, or association, where are kept its books of account and other data from which the return is prepared, or in the case of a foreign corporation, company, or association, to the collector of the district in which is located its principal place of business in the United States, or if it have no principal place of business, office, or agency in the United States, then to the collector of internal revenue at Baltimore, Maryland. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue;

(c) In cases wherein receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, joint-stock companies or associations, or insurance companies, subject to tax imposed by this title, such receivers, trustees, or assignees shall make returns of net income as and for such corporations, joint-stock companies or associations, and insurance companies, in the same manner and form as such organizations are hereinbefore required to make returns, and any income tax due on the basis of such returns made by receivers, trustees, or assignees shall be assessed and collected in the same manner as if assessed directly against the organizations of whose businesses or properties they have custody and control;

(d) A corporation, joint-stock company or association, or insurance company, keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned;

[(e) All the provisions of this title relating to the tax authorized and required to be deducted and withheld and paid to the officer of the

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United States Government authorized to receive the same from the income of non-resident alien individuals from sources within the United States shall be made applicable to the tax imposed by subdivision (a) of section ten upon incomes derived from interest upon bonds and mortgages or deeds of trust or similar obligations of domestic or other resident corporations, joint-stock companies or associations, and insurance companies by non-resident alien firms, copartnerships, companies, corporations, joint-stock companies or associations, and insurance companies, not engaged in business or trade within the United States and not having any office or place of business therein.]

(f) Likewise, all the provisions of this title relating to the tax authorized and required to be deducted and withheld and paid to the officer of the United States Government authorized to receive the same from the income of non-resident alien individuals from sources within the United States shall be made applicable to income derived from dividends upon the capital stock or from the net earnings of domestic or other resident corporations, joint-stock companies or associations, and insurance companies by non-resident alien companies, corporations, joint-stock companies or associations, and insurance companies not engaged in business or trade within the United States and not having any office or place of business therein.

ASSESSMENT AND ADMINISTRATION

Sec. 14. (a) All assessments shall be made and the several corporations, joint-stock companies or associations, and insurance companies shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessment shall be paid on or before the fifteenth day of June: *Provided*, That every corporation, joint-stock company or association, and insurance company, computing taxes upon the income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within one hundred and five days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this title or by existing law; and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint-stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the fifteenth day of June in any year, or after one hundred and five days from the date on which the return of income is required to be made by the taxpayer, and after ten days' notice and demand thereof by the collector, there shall be added the sum of five per centum

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on the amount of tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due: *Provided*, That upon the examination of any return of income made pursuant to this title, the Act of August fifth, nineteen hundred and nine, entitled, "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," and the Act of October third, nineteen hundred and thirteen, entitled, "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes;

(b) When the assessment shall be made, as provided in this title, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such: *Provided*, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President: *Provided further*, That the proper officers of any State imposing a general income tax may, upon the request of the governor thereof, have access to said returns or to an abstract thereof, showing the name and income of each such corporation, joint-stock company or association, or insurance company, at such times and in such manner as the Secretary of the Treasury may prescribe;[1]

(c) If any of the corporations, joint-stock companies or associations, or insurance companies aforesaid shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint-stock company or association, or insurance company shall be liable to a penalty of not exceeding $10,000: *Provided*, That the Commissioner of Internal Revenue shall have authority, in the case of either corporations or individuals, to grant a reasonable extension of time in meritorious cases, as he may deem proper.

(d) That section thirty-two hundred and twenty-five of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"Sec. 3225. When a second assessment is made in case of any list, statement, or return, which in the opinion of the collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation, no tax collected under such assessment shall be recovered by any suit unless it is proved that the said list, statement, or return was not false nor fraudulent and did not contain any under-

[1] See income tax law in the State systems of Connecticut, p. 795, *supra*, and New York, p. 877, *supra*.

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statement or undervaluation; but this section shall not apply to statements or returns made or to be made in good faith under the laws of the United States regarding annual depreciation of oil or gas wells and mines."

PART III.—GENERAL ADMINISTRATIVE PROVISIONS.

Sec. 15. That the word "State" or "United States" when used in this title shall be construed to include any Territory, the District of Columbia, Porto Rico, and the Philippine Islands, when such construction is necessary to carry out its provisions.

Sec. 16. That sections thirty-one hundred and sixty-seven, thirty-one hundred and seventy-two, thirty-one hundred and seventy-three, and thirty-one hundred and seventy-six of the Revised Statutes of the United States as amended are hereby amended so as to read as follows:

"Sec. 3167. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

"Sec. 3172. Every collector shall, from time to time, cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal-revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects.

"Sec. 3173. It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, or other tax imposed by law, when not otherwise provided for, (1) in case of a special tax, on or before the thirty-first day of July in each year, (2) in case of income tax on or before the first day of March in each year, or on or before the last day of the sixty-day period

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next following the closing date of the fiscal year for which it makes a return of its income, and (3) in other cases before the day on which the taxes accrue, to make a list or return, verified by oath, to the collector or a deputy collector of the district where located, of the articles or objects, including the amount of annual income charged with a duty or tax, the quantity of goods, wares, and merchandise, made or sold and charged with a tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for which such person, partnership, firm, association, or corporation is liable: *Provided*, That if any person liable to pay any duty or tax, or owning, possessing, or having the care or management of property, goods, wares, and merchandise, article or objects liable to pay any duty, tax, or license, shall fail to make and exhibit a list or return required by law, but shall consent to disclose the particulars of any and all the property, goods, wares, and merchandise, articles, and objects liable to pay any duty or tax, or any business or occupation liable to pay any tax as aforesaid, then, and in that case, it shall be the duty of the collector or deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath by the person so owning, possessing, or having the care and management as aforesaid, may be received as the list of such person: *Provided further*, That in case no annual list or return has been rendered by such person to the collector or deputy collector as required by law, and the person shall be absent from his or her residence or place of business at the time the collector or a deputy collector shall call for the annual list or return, it shall be the duty of such collector or deputy collector to leave at such place of residence or business, with some one of suitable age and discretion, if such be present, otherwise to deposit in the nearest post office, a note or memorandum addressed to such person, requiring him or her to render to such collector or deputy collector the list or return required by law within ten days from the date of such note or memorandum, verified by oath. And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, or refuses to allow any regularly authorized Government officer to examine the books of such person, firm, or corporation, it shall be lawful for the collector to summon such person, or any other person having possession, custody, or care of books of account containing entries relating to the business of such person, or any other person he may deem proper, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State

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or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned: *Provided*, That 'person,' as used in this section, shall be construed to include any corporation, joint-stock company or association, or insurance company when such construction is necessary to carry out its provisions.

"Sec. 3176. If any person, corporation, company, or association fails to make and file a return or list at the time prescribed by law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. Any return or list so made and subscribed by a collector or deputy collector shall be *prima facie* good and sufficient for all legal purposes.

"If the failure to file a return or list is due to sickness or absence the collector may allow such further time, not exceeding thirty days, for making and filing the return or list as he deems proper.

"The Commissioner of Internal Revenue shall assess all taxes, other than stamp taxes, as to which returns or lists are so made by a collector or deputy collector. In case of any failure to make and file a return or list within the time prescribed by law or by the collector, the Commissioner of Internal Revenue shall add to the tax fifty per centum of its amount except that, when a return is voluntarily and without notice from the collector filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner of Internal Revenue shall add to the tax one hundred per centum of its amount.

"The amount so added to any tax shall be collected at the same time and in the same manner and as part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax."

Sec. 17. That it shall be the duty of every collector of internal revenue, to whom any payment of any taxes is made under the provisions of this title, to give to the person making such payments a full written or printed receipt, expressing the amount paid and the particular account for which such payment was made; and whenever such payment is made such collector shall, if required, give a separate receipt for each tax paid by any debtor, on account of payments made to or to be made by him to separate creditors in such form that such debtor can conveniently produce the same separately to his several creditors in satisfaction of their respective demands to the amounts

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specified in such receipts; and such receipts shall be sufficient evidence in favor of such debtor to justify him in withholding the amount therein expressed from his next payment to his creditor; but such creditor may, upon giving to his debtor a full written receipt, acknowledging the payment to him of whatever sum may be actually paid, and accepting the amount of tax paid as aforesaid (specifying the same) as a further satisfaction of the debt to that amount, require the surrender to him of such collector's receipt.

[Sec. 18. That any person, corporation, partnership, association or insurance company, liable to pay the tax to make a return or to supply information required under this title, who refuses or neglects to pay such tax, to make such return or to supply such information at the time or times herein specified in each year, shall be liable, except as otherwise specially provided in this title, to a penalty of not less than $20 nor more than $1,000. Any individual or any officer of any corporation, partnership, association, or insurance company, required by law to make, render, sign, or verify any return or to supply any information, who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required by this title to be made, shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000, or be imprisoned not exceeding one year or both, in the discretion of the court, with the costs of prosecution: *Provided*, That where any tax heretofore due and payable has been duly paid by the taxpayer, it shall not be re-collected from any withholding agent required to retain it at its source, nor shall any penalty be imposed or collected in such cases from the taxpayer, or such withholding agent whose duty it was to retain it, for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.]

[Sec. 19. The collector or deputy collector shall require every return to be verified by the oath of the party rendering it. If the collector or deputy collector have reason to believe that the amount of any income returned is understated, he shall give due notice to the person making the return to show cause why the amount of the return should not be increased, and upon proof of the amount understated may increase the same accordingly. Such person may furnish sworn testimony to prove any relevant facts, and, if dissatisfied with the decision of the collector, may appeal to the Commissioner of Internal Revenue for his decision under such rules of procedure as may be prescribed by regulation.

[Sec. 20. That jurisdiction is hereby conferred upon the district courts of the United States for the district within which any person summoned under this title to appear to testify or to produce books shall reside, to compel such attendance, production of books, and testimony by appropriate process.

[Sec. 21. That the preparation and publication of statistics reasonably available with respect to the operation of the income tax law and

[Amendments of October 3, 1917, included in Brackets]

containing classifications of taxpayers and of income, the amounts allowed as deductions and exemptions, and any other facts deemed pertinent and valuable, shall be made annually by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

Sec. 22. That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed and not inconsistent with the provisions of this title, are hereby extended and made applicable to all the provisions of this title and to the tax herein imposed.

Sec. 23. That the provisions of this title shall extend to Porto Rico and the Philippine Islands: *Provided*, That the administration of the law and the collection of the taxes imposed in Porto Rico and the Philippine Islands shall be by the appropriate internal-revenue officers of those governments, and all revenues collected in Porto Rico and the Philippine Islands thereunder shall accrue intact to the general Governments thereof, respectively: *Provided further*, That the jurisdiction in this title conferred upon the district courts of the United States shall, so far as the Philippine Islands are concerned, be vested in the courts of the first instance of said islands: *And provided further*, That nothing in this title shall be held to exclude from the computation of the net income the compensation paid any official by the governments of the District of Columbia, Porto Rico, and the Philippine Islands, or the political subdivisions thereof.

Sec. 24. That Section II of the Act approved October third, nineteen hundred and thirteen, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," is hereby repealed, except as herein otherwise provided, and except that it shall remain in force for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any of such taxes, and except that the unexpected balance of any appropriation heretofore made and now available for the administration of such section or any provision thereof shall be available for the administration of this title or the corresponding provision thereof.

Sec. 25. That income on which has been assessed the tax imposed by Section II of the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October third, nineteen hundred and thirteen, shall not be considered as income within the meaning of this title: *Provided*, that this section shall not conflict with that portion of section ten, of this title, under which a taxpayer has fixed its own fiscal year.

Sec. 26. Every corporation, joint-stock company or association, or insurance company subject to the tax herein imposed, when required

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by the Commissioner of Internal Revenue, shall render a correct return, duly verified under oath, of its payments of dividends whether made in cash or its equivalent or in stock, including the names and addresses of stockholders and the number of shares owned by each, and the tax years and the applicable amounts in which such dividends were earned, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(Sections 27 to 32 inclusive were added by Act of Oct. 3, 1917.)

[Sec. 27. That every person, corporation, partnership, or association, doing business as a broker on any exchange or board of trade or other similar place of business shall, when required by the Commissioner of Internal Revenue, render a correct return duly verified under oath, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, showing the names of customers for whom such person, corporation, partnership, or association has transacted any business, with such details as to the profits, losses, or other information which the commissioner may require, as to each of such customers, as will enable the Commissioner of Internal Revenue to determine whether all income tax due on profits or gains of such customers has been paid.

Sec. 28. That all persons, corporations, partnerships, associations and insurance companies, in whatever capacity acting, including lessees or mortgagors of real or personal property, trustees acting in any trust capacity, executors, administrators, receivers, conservators, and employers, making payment to another person, corporation, partnership, association, or insurance company, of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable gains, profits, and income (other than payments described in sections twenty-six and twenty-seven), of $800 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, are hereby authorized and required to render a true and accurate return to the Commissioner of Internal Revenue, under such rules and regulations and in such form and manner as may be prescribed by him, with the approval of the Secretary of the Treasury, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment: *Provided*, That such returns shall be required, regardless of amounts, in the case of payments of interest upon bonds and mortgages or deeds of trust or other similar obligations of corporations, joint-stock companies, associations, and insurance companies, and in the case of collections of items (not payable in the United States) of interest upon the bonds of foreign countries and interest from the bonds and dividends from the stock of foreign corporations by persons, corporations, partnerships,

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or associations, undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange.

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person, corporation, partnership, association, or insurance company paying the income.

The provisions of this section shall apply to the calendar year nineteen hundred and seventeen and each calendar year thereafter, but shall not apply to the payment of interest on obligations of the United States.

Sec. 29. That in assessing income tax the net income embraced in the return shall also be credited with the amount of any excess profits tax imposed by Act of Congress and assessed for the same calendar or fiscal year upon the taxpayer and, in the case of a member of a partnership, with his proportionate share of such excess profits tax imposed upon the partnership.

Sec. 30. That nothing in Section II of the Act approved October third, nineteen hundred and thirteen, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," or in this title, shall be construed as taxing the income of foreign governments received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments, or from interest on deposits in banks in the United States of moneys belonging to foreign governments.

Sec. 31. The term "dividends" as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, association, or insurance company, out of its earnings or profits accrued since March 1, 1913, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of the earnings or profits so distributed.

(b) Any distribution made to the shareholders or members of a corporation, joint-stock company, or association, or insurance company in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the annual income of the distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, joint-stock company, association, or insurance company, but nothing herein shall be construed as taxing any earnings or profits accrued prior to March 1, 1913, but such earnings or profits may be distributed in stock dividends or otherwise, exempt from the tax, after the distribution of earnings and profits accrued since March 1, 1913, has been made. This subdivision shall not apply to any dis-

[Amendments of October 3, 1917, included in Brackets]

tribution made prior to August 6, 1917, out of earnings or profits accrued prior to March 1, 1913.

Sec. 32. Premiums paid on life insurance policies covering the lives of officers, employees, or those financially interested in any trade or business conducted by an individual, partnership, corporation, joint-stock company or association, or insurance company, shall not be deducted in computing the net income of such individual, corporation, joint-stock company or association, or insurance company, or in computing the profits of such partnership for the purposes of subdivision (e) of section 9.

Any amount heretofore withheld by any withholding agent as required by Title I of such Act of September eight, nineteen hundred and sixteen, on account of the tax imposed upon the income of any individual, a citizen or resident of the United States, for the calendar year nineteen hundred and seventeen, except in the cases covered by subdivision (c) of section 9 of such Act, as amended by this Act, shall be released and paid over to such individual, and the entire tax upon the income of such individual for such year shall be assessed and collected in the manner prescribed by such Act as amended by this Act.]

The Revenue Act of September eight, nineteen hundred and seventeen, of which the Income Tax as then enacted was Title I, concluded with the following section:

Sec. 900. That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of said Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

For similar provision in the Act of October three, nineteen hundred and seventeen, which enacted the amendments to the Income Tax Law, which have been incorporated in the Act as above, see *infra*, p. 104.

[Amendments of October 3, 1917, included in Brackets]

THE FEDERAL ESTATE OR INHERITANCE TAX.

The Federal Inheritance Tax, or Estate Tax, as it is called, was first enacted as Title II in the Act of September eight, nineteen hundred and sixteen, and was re-enacted and amended with increase of rates in the Act of March three, nineteen hundred and seventeen, in what is known as the Munitions Act, and was amended by increase of rates by the War Revenue Act of October three, nineteen hundred and seventeen.

The Act of nineteen hundred and sixteen as amended in March three, nineteen hundred and seventeen, is as follows:

TITLE II.—ESTATE TAX.[1]

Sec. 200. That when used in this title—

The term "person" includes partnerships, corporations, and associations;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue at Baltimore, Maryland.

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

"One and one-half per centum of the amount of such net estate not in excess of $50,000;

"Three per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

"Four and one-half per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

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[1] For construction of the Inheritance Tax Law enacted in the Spanish War Revenue Act of 1898, which was repealed April 12, 1902, see *supra*, Sec. 564.

[Amendments of October 3, 1917, included in Brackets]

"Six per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

"Seven and one-half per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

"Nine per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

"Ten and one-half per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

"Twelve per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

"Thirteen and one-half per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

"Fifteen per centum of the amount by which such net estate exceeds $5,000,000."

That the tax on the transfer of the net estate of decedents dying between September eighth, nineteen hundred and sixteen, and the passage of this Act shall be computed at the rates originally prescribed in the Act approved September eighth, nineteen hundred and sixteen.

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a non-resident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be

[Amendments of October 3, 1917, included in Brackets]

situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a non-resident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the non-resident not situated in the United States.

Sec. 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum, calculated from the time payment is made to the date when the tax is due, shall be deducted. If the tax is not paid within ninety days after it is due interest at the rate of ten per centum per annum from the time of the decedent's death shall be added as part of the tax, unless because of claims against the estate, necessary litigation, or other unavoidable delay the collector finds that the tax can not be determined, in which case the interest shall be at the rate of six per centum per annum from the time of the decedent's death until the cause of such delay is removed, and thereafter at the rate of ten per centum per annum. Litigation to defeat the payment of the tax shall not be deemed necessary litigation.

Sec. 205. That the executor, within thirty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by the regulations made under this title, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his

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death, or, in case of a non-resident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section two hundred and three; (c) the value of the net estate of the decedent as defined in section two hundred and three; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases of estates subject to the tax or where the gross estate at the death of the decedent exceeds $60,000, and in the case of the state of every non-resident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

Sec. 206. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section two hundred and five, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner of Internal Revenue shall assess the tax thereon.

Sec. 207. That the executor shall pay the tax to the collector or deputy collector. If for any reason the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid the commissioner shall notify the executor of the amount of such excess. From the time of such notification to the time of the final payment of such excess part of the tax, interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the

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property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Sec. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth), and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 210. That whoever knowingly makes any false statements in any notice or return required to be filed by this title shall be liable to a penalty of not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Whoever fails to comply with any duty imposed upon him by section two hundred and five, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, fails to exhibit the same upon request to the Commissioner of Internal Revenue or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not

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exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

Sec. 211. That all administrative, special, and general provisions of law, including the laws in relation to the assessment and collection of taxes, not heretofore specifically repealed, are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.

Sec. 212. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations, and prescribe and require the use of such books and forms, as he may deem necessary to carry out the provisions of this title.

THE INCREASE OF RATES UNDER THE WAR REVENUE TAX BILL.

The rates fixed by the Act of September 8, 1916, as amended by the Act of March 3, 1917, were further increased under the Title IX of the War Estate Tax, Sections 900 and 901, and a further provision was enacted exempting the estates of those dying in the military service. These sections are as follows:

[War Estate Tax: 900. In addition to the tax imposed by section 201 of the act entitled "An Act to increase the revenue, and for other purposes," approved September 8, 1916, as amended:

(a) A tax equal to the following percentages of its value is hereby imposed upon the transfer of each net estate of every decedent dying after the passage of this Act, the transfer of which is taxable under such section (the value of such net estate to be determined as provided in title 2 or such Act of September 8, 1916):

One-half of one per centum of the amount of such net estate not in excess of $50,000.

One per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000.

One and one-half per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000.

Two per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000.

Two and one-half per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000.

Three per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000.

Three and one-half per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000.

Four per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $4,000,000.

Four and one-half per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000.

[Amendments of October 3, 1917, included in Brackets]

Five per centum of the amount by which such net estate exceeds $5,000,000 and does not exceed $8,000,000.

Seven per centum of the amount by which such net estate exceeds $8,000,000 and does not exceed $10,000,000; and

Ten per centum of the amount by which such net estate exceeds $10,000,000.

901. The tax imposed by this title shall not apply to the transfer of the net estate of any decedent dying while serving in the military or naval forces of the United States, during the continuance of the war, in which the United States is now engaged, or if death results from injuries received or disease contracted in such service, within one year after the termination of such war. For the purposes of this section the termination of the war shall be evidenced by the proclamation of the President.]

A table is appended showing the rates, first, under the original Act; second, under the Act as amended March 3, 1917, and third, as increased by the Act of October 3, 1917:

(The progressive rates in estates exceeding $5,000,000 in value only appear in the War Revenue Act of October 3, 1917.)

	Act of Sept. 8, 1916	Act of March 3, 1917	Act of Oct. 3, 1917
Net estates in excess of $50,000..	1%	1½%	2%
Of amount by which net estate exceeds $50,000 and does not exceed $150,000	2%	3%	4%
Of amount by which net estate exceeds $150,000 and does not exceed $250,000	3%	4½%	6%
Of amount by which net estate exceeds $250,000 and does not exceed $450,000	4%	6%	8%
Of amount by which net estate exceeds $450,000 and does not exceed $1,000,000	5%	7½%	10%
Of amount by which net estate exceeds $1,000,000 and does not exceed $2,000,000	6%	9%	12%
Of amount by which net estate exceeds $2,000,000 and does not exceed $3,000,000	7%	10½%	14%
Of amount by which net estate exceeds $3,000,000 and does not exceed $4,000,000	8%	12%	16%

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Of amount by which net estate exceeds $4,000,000 and does not exceed $5,000,000	9%	13½%	18%
Of amount by which net estate exceeds $5,000,000 and does not exceed $8,000,000	10%	15%	20%
Of amount by which net estate exceeds $8,000,000 and does not exceed $10,000,000	10%	15%	22%
Of amount by which such net estate exceeds $10,000,000....	10%	15%	25%

THE MUNITIONS TAX.

Title III of the Act of September 8, 1916, known as the Munitions Manufacturers' Tax Act, was amended by the Act of March 3, 1917, and repealed by Section 214 of the Act of October 3, 1917, wherein it was provided that any amount paid should be credited toward the payment of the tax imposed by the Act of October 3, 1917, and it was amended so that the rate of tax for the taxable year of 1917 should be ten per cent instead of twelve and one-half per cent. But that ceased to be in effect on and after January 1, 1918.

TITLE IV.—MISCELLANEOUS TAXES.

Sec. 400. That there shall be levied, collected, and paid a tax of $1.50 on all beer, lager beer, ale, porter, and other similar fermented liquor, brewed or manufactured and sold, or stored in warehouse, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, for every barrel containing not more than thirty-one gallons; and at a like rate for any other quantity or for the fractional parts of a barrel authorized and defined by law. And section thirty-three hundred and thirty-nine of the Revised Statutes is hereby amended accordingly.

Sec. 401. That natural wine within the meaning of this Act shall be deemed to be the product made from the normal alcoholic fermentation of the juice of sound, ripe grapes, without addition or abstraction, except such as may occur in the usual cellar treatment of clarifying and aging: *Provided, however*, That the product made from the juice of sound, ripe grapes by complete fermentation of the must under proper cellar treatment and corrected by the addition (under the supervision of a gauger or storekeeper-gauger in the capacity of gauger) of a solution of water and pure cane, beet, or dextrose sugar (containing, respectively, not less than ninety-five per centum of actual sugar, calculated on a dry basis) to the must or to the wine, to correct natural deficiencies, when such addition shall not increase the volume of the resultant product more than thirty-five per centum, and the resultant product does not contain less than five parts per thousand of acid before fermentation and not more than thirteen per centum of alcohol after complete fermentation, shall be deemed to be wine within the meaning of this Act, and may be labeled, transported, and sold as "wine," qualified by the name of the locality where produced, and may be further qualified by the name of its own particular type or variety: *And provided further*, That wine as defined in this section may be sweetened with cane sugar or beet sugar or pure condensed grape must and fortified under the provisions of this Act, and wines so sweetened or fortified shall be considered sweet wine within the meaning of this Act.

Sec. 402. (a) That upon all still wines, including vermouth, and upon all artificial or imitation wines or compound sold as wine hereafter produced in or imported into the United States, and upon all like wines which on the date this section takes effect shall be in the possession or under the control of the producer, holder, dealer, or compounder there shall be levied, collected, and paid taxes at rates as follows:

On wines containing not more than fourteen per centum of absolute alcohol, 4 cents per wine gallon, the per centum of alcohol taxable under this section to be reckoned by volume and not by weight.

On wines containing more than fourteen per centum and not ex-

ceeding twenty-one per centum of absolute alcohol, 10 cents per wine gallon.

On wines containing more than twenty-one per centum and not exceeding twenty-four per centum of absolute alcohol, 25 cents per wine gallon.

All such wines containing more than twenty-four per centum of absolute alcohol by volume shall be classed as distilled spirits and shall pay tax accordingly: *Provided*, That on all unsold still wines in the actual possession of the producer at the time this title takes effect, upon which the tax imposed by the Act approved October twenty-second, nineteen hundred and fourteen, entitled "An Act to increase the internal revenue and for other purposes," and the joint resolution approved December seventeenth, nineteen hundred anl fifteen, entitled "Joint resolution extending the provisions of the Act entitled 'An Act to increase the internal revenue, and for other purposes,' approved October twenty-second, nineteen hundred and fourteen, to December thirty-first, nineteen hundred and sixteen," has been assessed, the tax so assessed shall be abated, or, if paid, refunded under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

(b) That the taxes imposed by this section shall be paid by stamp on removal of the wines from the customhouse, winery, or other bonded place of storage for consumption or sale, and every person hereafter producing, or having in his possession or under his control when this section takes effect, any wines subject to the tax imposed in this section shall file such notice, describing the premises on which such wines are produced or stored; shall execute a bond in such form; shall make such inventories under oath; and shall, prior to sale or removal for consumption, affix to each cask or vessel containing such wine such marks, labels, or stamps as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe; and the premises described in such notice shall, for the purpose of this section, be regarded as bonded premises. But the provisions of this subdivision of this section, except as to payment of tax and the affixing of the required stamps or labels, shall not apply to wines held by retail dealers, as defined in section thirty-two hundred and forty-four of the Revised Statutes of the United States, nor, subject to regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall the tax imposed by this section apply to wines produced for the family use of the producer thereof and not sold or otherwise removed from the place of manufacture and not exceeding in any case two hundred gallons per year. The Commissioner of Internal Revenue is hereby authorized to have prepared and issue such stamps denoting payment of the tax imposed by this section as he may deem requisite and necessary; and until such stamps are provided the taxes imposed by this section shall be assessed and collected as other taxes are assessed and collected, and all provisions of law relating to assessment and collection of taxes, so far as applicable, are hereby extended to the taxes imposed by this section.

(c) That under such regulations and official supervision and upon the giving of such notices, entries, bonds, and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, any producer of wines defined under the provisions of this section or section four hundred and one of this Act, may withdraw from any fruit distillery or special bonded warehouse grape brandy, or wine spirits, for the fortification of such wines on the premises where actually made: *Provided*, That there shall be levied and assessed against the producer of such wines a tax of 10 cents per proof gallon of grape brandy or wine spirits so used by him in the fortification of such wines during the preceding month, which assessment shall be paid by him within six months from the date of notice thereof: *Provided further*, That nothing herein contained shall be construed as exempting any wines, cordials, liqueurs, or similar compounds from the payment of any tax provided for in this section.

That sections forty-two, forty-three, and forty-five of the Act of October first, eighteen hundred and ninety, as amended by section sixty-eight of the Act of August twenty-seventh, eighteen hundred and ninety-four, are further amended to read as follows:

"Sec. 42. That any producer of pure sweet wines may use in the preparation of such sweet wines, under such regulations and after the filing of such notices and bonds, together with the keeping of such records and the rendition of such reports as to materials and products as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, wine spirits produced by any duly authorized distiller, and the Commissioner of Internal Revenue, in determining the liability of any distiller of wine spirits to assessment under section thirty-three hundred and nine of the Revised Statutes, is authorized to allow such distiller credit in his computations for the wine spirits withdrawn to be used in fortifying sweet wines under this Act.

"Sec. 43. That the wine spirits mentioned in section forty-two herein mentioned is the product resulting from the distillation of fermented grape juice, to which water may have been added prior to, during, or after fermentation, for the sole purpose of facilitating the fermentation and economical distillation thereof, and shall be held to include the product from grapes or their residues commonly known as grape brandy, and shall include commercial grape brandy which may have been colored with burnt sugar or caramel; and the pure sweet wine which may be fortified with wine spirits under the provisions of this Act is fermented or partially fermented grape juice only, with the usual cellar treatment, and shall contain no other substance whatever introduced before, at the time of, or after fermentation, except as herein expressly provided; *Provided*, That the addition of pure boiled or condensed grape must or pure crystallized cane or beet sugar, or pure dextrose sugar containing, respectively, not less than ninety-five per centum of actual sugar, calculated on a dry basis, or water, or any or all of them, to the pure grape juice before fermentation, or to the fermented product of such grape

juice, or to both, prior to the fortification herein provided for, either for the purpose of perfecting sweet wines according to commercial standards or for mechanical purposes, shall not be excluded by the definition of pure sweet wine aforesaid: *Provided, however,* That the cane or beet sugar, or pure dextrose sugar added for sweetening purposes shall not be in excess of eleven per centum of the weight of the wine to be fortified: *And provided further,* That the addition of water herein authorized shall be under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe: *Provided, however,* That records kept in accordance with such regulations as to the percentage of saccharine, acid, alcoholic, and added water content of the wine offered for fortification shall be open to inspection by any official of the Department of Agriculture thereto duly authorized by the Secretary of Agriculture; but in no case shall such wines to which water has been added be eligible for fortification under the provisions of this Act, where the same, after fermentation and before fortification, have an alcoholic strength of less than five per centum of their volume.

"Sec. 45. That under such regulations and official supervision, and upon the execution of such entries and the giving of such bonds, bills of lading, and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, any producer of pure sweet wines as defined by this Act may withdraw wine spirits from any special bonded warehouse in original packages or from any registered distillery in any quantity not less than eighty wine gallons, and may use so much of the same as may be required by him under such regulations, and after the filing of such notices and bonds and the keeping of such records and the rendition of such reports as to materials and products and the disposition of the same as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, in fortifying the pure sweet wines made by him, and for no other purpose, in accordance with the foregoing limitations and provisions; and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized whenever he shall deem it to be necessary for the prevention of violations of this law to prescribe that wine spirits withdrawn under this section shall not be used to fortify wines except at a certain distance prescribed by him from any distillery, rectifying house, winery, or other establishment used for producing or storing distilled spirits, or for making or storing wines other than wines which are so fortified, and that in the building in which such fortification of wines is practiced no wines or spirits other than those permitted by this regulation shall be stored in any room or part of the building in which fortification of wines is practiced. The use of wine spirits for the fortification of sweet wines under this Act shall be under the immediate supervision of an officer of internal revenue, who shall make returns describing the kinds and quantities of wine so fortified, and shall affix such stamps and seals to the packages containing such wines as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the Commissioner of

Internal Revenue, with the approval of the Secretary of the Treasury, shall provide by regulations the time within which wines so fortified with the wine spirits so withdrawn may be subject to inspection, and for final accounting for the use of such wine spirits and for rewarehousing or for payment of the tax on any portion of such wine spirits which remain not used in fortifying pure sweet wines."

(d) That under such regulations and upon the execution of such notices, entries, bonds, and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, domestic wines subject to the tax imposed by this section may be removed from the winery where produced, free of tax, for storage on other bonded premises or from said premises to other bonded premises: *Provided*, That not more than one such additional removal shall be allowed, or for exportation from the United States or for use as distilling material at any regularly registered distillery: *Provided, however*, That the distiller using any such wine as material shall, subject to the provisions of section thirty-three hundred and nine of the Revised Statutes of the United States, as amended, be held to pay the tax on the product of such wines as will include both the alcoholic strength therein produced by fermentation and that obtained from the brandy or wine spirits added to such wines at the time of fortification.

(e) That upon all domestic and imported sparkling wines, liqueurs, cordials, and similar compounds remaining in the hands of dealers when this section takes effect, or thereafter removed from the place of manufacture or storage for sale or consumption, there shall be levied and paid, by stamp, taxes as follows:

On each bottle or other container of champagne or sparkling wine, 3 cents on each one-half pint or fraction thereof.

On each bottle or other container of artificially carbonated wine, 1½ cents on each one-half pint or fraction thereof.

On each bottle or other container of liqueurs, cordials, or similar compounds, by whatever name sold or offered for sale, containing sweet wine, fortified with grape brandy under the provisions of paragraph (c) of this section, 1½ cents on each one-half pint or fraction thereof.

The taxes imposed by this section shall not apply to wines, liqueurs, or cordials on which the tax imposed by the Act approved October twenty-second, nineteen hundred and fourteen, entitled "An Act to increase the internal revenue, and for other purposes," and the joint resolution approved December seventeenth, nineteen hundred and fifteen, entitled "Joint resolution extending the provisions of the Act entitled 'An Act to increase the internal revenue, and for other purposes,' approved October twenty-second, nineteen hundred and fourteen, to December thirty-first, nineteen hundred and sixteen," has been paid by stamp.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to have prepared suitable revenue stamps denoting the payment of the taxes imposed

by this section; and all provisions of law relating to internal-revenue stamps, so far as applicable, are hereby extended to the taxes imposed by this section: *Provided*, That the collection of the tax herein prescribed on imported still wines, including vermouth, and sparkling wines, including champagne, and on imported liqueurs, cordials and similar compounds, may be made within the discretion of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, by assessment instead of by stamps.

(f) That any person who shall evade or attempt to evade the tax imposed by this section, or any requirement of this section or regulation issued pursuant thereof, or who shall, otherwise than provided in this section, recover or attempt to recover any spirits from domestic or imported wine, or who shall rectify, mix, or compound with distilled spirits any domestic wines, other than in the manufacture of liqueurs, cordials, or similar compounds taxable under the provisions of this section, shall, on conviction, be punished for each such offense by a fine of not exceeding $5,000, or imprisonment for not more than five years, or both, and all wines, spirits, liqueurs, cordials, or similar compounds as to which such violation occurs shall be forfeited to the United States. But the provision of this subdivision of this section and the provision of section thirty-two hundred and forty-four of the Revised Statutes of the United States, as amended, relating to rectification, or other internal-revenue laws of the United States, shall not be held to apply to or prohibit the mixing or blending of wines subject to tax under the provisions of this section with each other or with other wines for the sole purpose of perfecting such wines according to commercial standards: *Provided*, That nothing herein contained shall be construed as prohibiting the use of tax-paid grain or other ethyl alcohol in the fortification of sweet wines as defined in section fifty-three of this Act.

(g) That the Commissioner of Internal Revenue, by regulations to be approved by the Secretary of the Treasury, may require the use at each fruit distillery of such spirit meters, and such locks and seals to be affixed to fermenters, tanks, or other vessels and to such pipe connections as may in his judgment be necessary or expedient; and the said commissioner is hereby authorized to assign to any such distillery and to each winery where wines are to be fortified such number of gaugers or storekeeper-gaugers in the capacity of gaugers as may be necessary for the proper supervision of the manufacture of brandy or the making or fortifying of wines subject to tax imposed by this section; and the compensation of such officers shall not exceed $5 per diem while so assigned, together with their actual and necessary traveling expenses, and also a reasonable allowance for their board bills, to be fixed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, but not to exceed $2.50 per diem for said board bills.

(h) That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to make such allowances for unavoidable loss of wines while on storage or during

cellar treatment as in his judgment may be just and proper, and to prepare all necessary regulations for carrying into effect the provisions of this section.

(i). That the second paragraph of section thirty-two hundred and sixty-four, Revised Statutes of the United States of America, as amended by section five of the Act of March first, eighteen hundred and seventy-nine, and as further amended by the Act of Congress approved June twenty-second, nineteen hundred and ten, be amended so as to read as follows:

"In all surveys forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses, except in distilleries operated on the sour-mash principle, in which distilleries sixty gallons of beer brewed or fermented from grain shall represent not less than one bushel of grain, and except that in distilleries where the filtration-aeration process is used, with the approval of the Commissioner of Internal Revenue; that is, where the mash after it leaves the mash tub is passed through a filtering machine before it is run into the fermenting tub, and only the filtered liquor passes into the fermenting tub, there shall hereafter be no limitation upon the number of gallons of water which may be used in the process of mashing or filtration for fermentation; but the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in order to protect the revenue, shall be authorized to prescribe by regulation, to be made by him, such character of survey as he may find suitable for distilleries using such filtration-aeration process. The provisions hereof relating to filtration-aeration process shall apply only to sweet-mash distilleries."

Sec. 403. That under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, alcohol or other distilled spirits of a proof strength of not less than one hundred and eighty degrees intended for export free of tax may be drawn from receiving cisterns at any distillery, or from storage tanks in any distillery warehouse, for transfer to tanks or tank cars for export from the United States, and all provisions of existing law relating to the exportation of distilled spirits not inconsistent herewith shall apply to spirits removed for export under the provisions of this Act.

Sec. 404. That section thirty-two hundred and thirty-five of the Revised Statutes as amended by Act of June third, eighteen hundred and ninety-six, and as further amended by Act of March second, nineteen hundred and eleven, be further amended so as to read as follows:

"Sec. 3255. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may exempt distillers of brandy made exclusively from apples, peaches, grapes, pears, pineapples, oranges, apricots, berries, plums, pawpaws, persimmons,

prunes, figs, or cherries from any provision of this title relating to the manufacture of spirits, except as to the tax thereon, when in his judgment it may seem expedient to do so: *Provided*, That where, in manufacture of wine, artificial sweetening has been used the wine or the fruit pomace residuum may be used in the distillation of brandy, as such use shall not prevent the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, from exempting such distiller from any provision of this title relating to the manufacture of spirits, except as to the tax thereon, when in his judgment it may seem expedient to do so: *And provided further*, That the distillers mentioned in this section may add to not less than five hundred gallons (or ten barrels) of grape cheese not more than five hundred gallons of a sugar solution made from cane, beet, starch, or corn sugar, ninety-five per centum pure, such solution to have a saccharine strength of not to exceed ten per centum, and may ferment the resultant mixture on a winery or distillery premises, and such fermented product shall be regarded as distilling material."

Sec. 405. That distilled spirits known commercially as gin of not less than eighty per centum proof may at any time within eight years after entry in bond at any distillery be bottled in bond at such distillery for export without the payment of tax, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

Sec. 406. That section thirty-three hundred and fifty-four of the Revised Statutes of the United States as amended by the Act approved June eighteenth, eighteen hundred and ninety, be, and is hereby, amended to read as follows:

"Sec. 3354. Every person who withdraws any fermented liquor from any hogshead, barrel, keg, or other vessel upon which the proper stamp has not been affixed for the purpose of bottling the same, or who carries on or attempts to carry on the business of bottling fermented liquor in any brewery or other place in which fermented liquor is made, or upon any premises having communication with such brewery, or any warehouse, shall be liable to a fine of $500, and the property used in such bottling or business shall be liable to forfeiture: *Provided, however*, That this section shall not be construed to prevent the withdrawal and transfer of unfermented, partially fermented, or fermented liquors from any of the vats in any brewery by way of a pipe line or other conduit to another building or place for the sole purpose of bottling the same, such pipe line or conduit to be constructed and operated in such manner and with such cisterns, vats, tanks, valves, cocks, faucets, and gauges, or other utensils or apparatus, either on the premises of the brewery or the bottling house, and with such changes of or additions thereto, and such locks, seals, or other fastenings, and under such rules and regulations as shall be from time to time prescribed by the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury, and all locks and seals prescribed shall be provided by the Commissioner of Internal Revenue at the expense of the United States: *Provided*

further, That the tax imposed in section thirty-three hundred and thirty-nine of the Revised Statutes of the United States shall be paid on all fermented liquor removed from a brewery to a bottling house by means of a pipe or conduit, at the time of such removal, by the cancellation and defacement, by the collector of the district or his deputy, in the presence of the brewer, of the number of stamps denoting the tax on the fermented liquor thus removed. The stamps thus canceled and defaced shall be disposed of and accounted for in the manner directed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. And any violation of the rules and regulations hereafter prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in pursuance of these provisions, shall be subject to the penalties above provided by this section. Every owner, agent, or superintendent of any brewery or bottling house who removes, or connives at the removal of, any fermented liquor through a pipe line or conduit, without payment of the tax thereon, or who attempts in any manner to defraud the revenue as above, shall forfeit all the liquors made by and for him, and all the vessels, utensils, and apparatus used in making the same.

SPECIAL TAXES.

Sec. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:

Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: *Provided*, That in the case of insurance companies such deposits and reserve funds as they are required by law or contract to maintain or hold for the protection of or payment to or apportionment among policyholders shall not be included. The amount of such annual tax shall in all cases be computed on the basis of the fair average value of the capital stock for the preceding year: *Provided*, That for the purpose of this tax an exemption of $99,000 shall be allowed from the capital stock as defined in this paragraph of each corporation, joint-stock company or association, or insurance company: *Provided further*, That a corporation, joint-stock company or association, or insurance company, actually paying the tax imposed by section three hundred and one of Title III of this Act shall be entitled to a credit as against the tax imposed by this paragraph equal to the amount of the tax so actually paid: *And provided further*, That this tax shall not be imposed upon any corporation, joint-

stock company or association, or insurance company not engaged in business during the preceding taxable year, or which is exempt under the provisions of section eleven, Title I, of this Act.

Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit under the laws of any foreign country and engaged in business in the United States shall pay annually a special excise tax with respect to the carrying on or doing business in the United States by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the capital actually invested in the transaction of its business in the United States: *Provided*, That in the case of insurance companies such deposits or reserve funds as they are required by law or contract to maintain or hold in the United States for the protection of or payment to or apportionment among policyholders, shall not be included. The amount of such annual tax shall in all cases be computed on the basis of the average amount of capital so invested during the preceding year: *Provided*, That for the purpose of this tax an exemption from the amount of capital so invested shall be allowed equal to such proportion of $99,000 as the amount so invested bears to the total amount invested in the transaction of business in the United States or elsewhere: *Provided further*, That this exemption shall be allowed only if such corporation, joint-stock company or association, or insurance company makes return to the Commissioner of Internal Revenue, under regulations prescribed by him, with the approval of the Secretary of the Treasury, of the amount of capital invested in the transaction of business outside the United States: *And provided further*, That a corporation, joint-stock company or association, or insurance company actually paying the tax imposed by section three hundred and one of Title III of this act, shall be entitled to a credit as against the tax imposed by this paragraph equal to the amount of the tax so actually paid: *And provided further*, That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year, or which is exempt under the provisions of section eleven, Title I, of this Act.

Second. Brokers shall pay $30. Every person, firm, or company, whose business it is to negotiate purchases or sales of stocks, bonds, exchange, bullion, coined money, bank notes, promissory notes, or other securities for others, shall be regarded as a broker.

Third. Pawnbrokers shall pay $50. Every person, firm, or company whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the repayment of money loaned thereon, shall be deemed a pawnbroker.

Fourth. Ship brokers shall pay $20. Every person, firm, or company whose business it is as a broker to negotiate freights and other business for the owners of vessels, or for the shippers or consignors or consignees of freight carried by vessels, shall be regarded as a ship broker under this section.

Fifth. Customhouse brokers shall pay $10. Every person, firm, or company whose occupation it is, as the agent of others, to arrange entries and other customhouse papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise, shall be regarded as a customhouse broker.

Sixth. Proprietors of theaters, museums, and concert halls, where a charge for admission is made, having a seating capacity of not more than two hundred and fifty, shall pay $25; having a seating capacity of more than two hundred and fifty and not exceeding five hundred, shall pay $50; having a seating capacity exceeding five hundred and not exceeding eight hundred, shall pay $75; having a seating capacity of more than eight hundred, shall pay $100. Every edifice used for the purpose of dramatic or operatic or other representations, plays, or performances, for admission to which entrance money is received, not including halls or armories rented or used occasionally for concerts or theatrical representations, shall be regarded as a theater: *Provided*, That in cities, towns, or villages of five thousand inhabitants or less the amount of such payment shall be one-half of that above stated: *Provided further*, That whenever any such edifice is under lease at the passage of this Act, the tax shall be paid by the lessee, unless otherwise stipulated between the parties to said lease.

Seventh. The proprietor or proprietors of circuses shall pay $100. Every building, space, tent, or area where feats of horsemanship or acrobatic sports or theatrical performances not otherwise provided for in this section are exhibited shall be regarded as a circus: *Provided*, That no special tax paid in one State, Territory, or the District of Columbia shall exempt exhibitions from the tax in another State, Territory, or the District of Columbia, and but one special tax shall be imposed for exhibitions within any one State, Territory, or District.

Eighth. Proprietors or agents of all other public exhibitions or shows for money not enumerated in this section shall pay $10: *Provided*, That a special tax paid in one State, Territory, or the District of Columbia shall not exempt exhibitions from the tax in another State, Territory, or the District of Columbia, and but one special tax shall be required for exhibitions within any one State, Territory, or the District of Columbia: *Provided further*, That this paragraph shall not apply to Chautauquas, lecture lyceums, agricultural or industrial fairs, or exhibitions held under the auspices of religious or charitable associations: *Provided further*, That an aggregation of entertainments, known as a street fair, shall not pay a larger tax than $100 in any State, Territory, or in the District of Columbia.

Ninth. Proprietors of bowling alleys and billiard rooms shall pay $5 for each alley or table. Every building or place where bowls are thrown or where games of billiards or pool are played, except in private homes, shall be regarded as a bowling alley or a billiard room, respectively.

Sec. 408. That on and after January first, nineteen hundred and seventeen, special taxes on tobacco, cigar, and cigarette manufac-

turers shall be, and hereby are, imposed annually as follows, the amount of such annual taxes to be computed in all cases on the basis of the annual sales for the preceding fiscal year:

Manufacturers of tobacco whose annual sales do not exceed fifty thousand pounds shall each pay $3;

Manufacturers of tobacco whose annual sales exceed fifty thousand and do not exceed one hundred thousand pounds shall each pay $6;

Manufacturers of tobacco whose annual sales exceed one hundred thousand and do not exceed two hundred thousand pounds shall each pay $12;

Manufacturers of tobacco whose annual sales exceed two hundred thousand pounds shall each pay at the rate of 8 cents per thousand pounds, or fraction thereof;

Manufacturers of cigars whose annual sales do not exceed fifty thousand cigars shall each pay $2;

Manufacturers of cigars whose annual sales exceed fifty thousand and do not exceed one hundred thousand cigars shall each pay $3;

Manufacturers of cigars whose annual sales exceed one hundred thousand and do not exceed two hundred thousand cigars shall each pay $6;

Manufacturers of cigars whose annual sales exceed two hundred thousand and do not exceed four hundred thousand cigars shall each pay $12;

Manufacturers of cigars whose annual sales exceed four hundred thousand cigars shall each pay at the rate of 5 cents per thousand cigars, or fraction thereof;

Manufacturers of cigarettes, including small cigars weighing not more than three pounds per thousand, shall each pay at the rate of 3 cents for every ten thousand cigarettes, or fraction thereof.

In arriving at the amount of special tax to be paid under this section, and in the levy and collection of such tax, each person, firm, or corporation engaged in the manufacture of more than one of the classes of articles specified in this section shall be considered and deemed a manufacturer of each class separately.

Every person who carries on any business or occupation for which special taxes are imposed by this title, without having paid the special tax therein provided, shall, besides being liable to the payment of such special tax, be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than $500, or be imprisoned not more than six months, or both, in the discretion of the court.

Sec. 409. That all administrative or special provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this title, and every person, firm, company, corporation, or association liable to any tax imposed by this title, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe.

Sec. 410. That the Act approved October twenty-second, nineteen hundred and fourteen entitled "An Act to increase the internal revenue, and for other purposes," and the joint resolution approved December seventeenth, nineteen hundred and fifteen, entitled "Joint resolution extending the provisions of the Act entitled 'An Act to increase the internal revenue, and for other purposes,' approved October twenty-second, nineteen hundred and fourteen, to December thirty-first, nineteen hundred and sixteen," are hereby repealed, except sections three and four of such Act as so extended, which section shall remain in force till January first, nineteen hundred and seventeen, and except that the provisions of the said Act shall remain in force for the assessment and collection of all special taxes imposed by sections three and four thereof, or by such sections as extended by said joint resolution, for any year or part thereof ending prior to January first, nineteen hundred and seventeen, and of all other taxes imposed by such Act, or by such Act as so extended, accrued prior to the taking effect of this title, and for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any of such taxes.

Sec. 411. That the Commissioner of Internal Revenue, subject to regulation prescribed by the Secretary of the Treasury, may make allowance for or redeem stamps, issued, under authority of the Act approved October twenty-second, nineteen hundred and fourteen, entitled "An Act to increase the internal revenue, and for other purposes," and the joint resolution approved December seventeenth, nineteen hundred and fifteen, entitled "Joint resolution extending the provisions of the Act entitled 'An Act to increase the internal revenue, and for other purposes,' approved October twenty-second, nineteen hundred and fourteen, to December thirty-first, nineteen hundred and sixteen," to denote the payment of internal revenue tax, and which have not been used, if presented within two years after the purchase of such stamps.

Sec. 412. That the provisions of this title shall take effect on the day following the passage of this Act, except where otherwise in this title provided.

Sec. 413. That all internal revenue agents and inspectors be granted leave of absence with pay, which shall not be cumulative, not to exceed thirty days in any calendar year, under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

Title V relates to the imposition of duties upon dye stuffs, and Title VI relates to tariff duties upon printing paper. Title VII authorizes the creation and establishment of a Tariff Commission and prescribes the duties of such Commission. Title VIII deals with the subject of unfair competition, defines the same and imposes penalties therefor and makes provisions for regulation of duties during the existence of the war "wherein the United States is not engaged." For concluding section of the act relating to the separability of the paragraphs in the event of

invalidity being established, see *supra*, p. 982. The act repealed all provisions of any act inconsistent with the act.

THE ACT OF MARCH 3, 1917.

This act was entitled to provide increased revenue to defray the expenses of the increased appropriations for the army and navy and the extension of fortifications and other purposes.

Title I of the act concerning the special preparedness fund was repealed by the Act of October 3, 1917.

Title II concerning the excess profits tax was also amended and repealed by the Act of October 3, 1917, see *infra*, p. 1016.

Title III amending Title II of the Act of September 8, 1916, relating to the Estate Tax, see *supra*, p. 983.

Title IV relating to the issue of bonds and certificates of indebtedness, and also contained a provision relating to the administrative provision of the Income Tax. See section 26 of Income Tax Act, *supra*.

THE WAR REVENUE ACT.

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WAR REVENUE ACT OF 1917

AN ACT

To provide revenue to defray war expenses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.—War Income Tax.

Section 1. That in addition to the normal tax imposed by subdivision (*a*) of section one of the Act entitled "An Act to increase the revenue, and for other purposes," approved September eight, nineteen hundred and sixteen, there shall be levied, assessed, collected, and paid a like normal tax of two per centum upon the income of every individual, a citizen or resident of the United States, received in the calendar year nineteen hundred and seventeen and every calendar year thereafter.

Sec. 2. That in addition to the additional tax imposed by subdivision (*b*) of section one of such Act of September eighth, nineteen hundred and sixteen, there shall be levied, assessed, collected and paid a like additional tax upon the income of every individual received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, as follows:

One per centum per annum upon the amount by which the total net income exceeds $5,000 and does not exceed $7,500;

Two per centum per annum upon the amount by which the total net income exceeds $7,500 and does not exceed $10,000;

Three per centum per annum upon the amount by which the total net income exceeds $10,000 and does not exceed $12,500;

Four per centum per annum upon the amount by which the total net income exceeds $12,500 and does not exceed $15,000;

Five per centum per annum upon the amount by which the total net income exceeds $15,000 and does not exceed $20,000;

Seven per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $40,000;

Ten per centum per annum upon the amount by which the total net income exceeds $40,000 and does not exceed $60,000;

Fourteen per centum per annum upon the amount by which the total net income exceeds $60,000 and does not exceed $80,000;

Eighteen per centum per annum upon the amount by which the total net income exceeds $80,000 and does not exceed $100,000;

Twenty-two per centum per annum upon the amount by which the total net income exceeds $100,000 and does not exceed $150,000;

Twenty-five per centum per annum upon the amount by which the total net income exceeds $150,000 and does not exceed $200,000;

Thirty per centum per annum upon the amount by which the total net income exceeds $200,000 and does not exceed $250,000;

Thirty-four per centum per annum upon the amount by which the total net income exceeds $250,000 and does not exceed $300,000;

Thirty-seven per centum per annum upon the amount by which the total net income exceeds $300,000 and does not exceed $500,000;

Forty per centum per annum upon the amount by which the total net income exceeds $500,000 and does not exceed $750,000;

Forty-five per centum per annum upon the amount by which the total net income exceeds $750,000 and does not exceed $1,000,000;

Fifty per centum per annum upon the amount by which the total net income exceeds $1,000,000.

Sec. 3. That the taxes imposed by sections one and two of this Act shall be computed, levied, assessed, collected and paid upon the same basis and in the same manner as the similar taxes imposed by section one of such Act of September eighth, nineteen hundred and sixteen, except that in the case of the tax imposed by section one of this Act (*a*) the exemptions of $3,000 and $4,000 provided in section seven of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, shall be, respectively, $1,000 and $2,000, and (*b*) the returns required under subdivisions (*b*) and (*c*) of section eight of such Act, as amended by this Act, shall be required in the case of net incomes of $1,000 or over, in the case of unmarried persons, and $2,000 or over in the case of married persons, instead of $3,000 or over, as therein provided, and (*c*) the provisions of subdivision (*c*) of section nine of such Act, as amended by this Act, requiring the normal tax of individuals on income derived from interest to be deducted and withheld at the source of the income shall not apply to the new two per centum normal tax prescribed in section one of this Act until on and after January first, nineteen hundred and eighteen, and thereafter only one two per centum normal tax shall be deducted and withheld at the source under the provisions of such subdivision (*c*), and any further normal tax for which the recipient of such income is liable under this Act or such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, shall be paid by such recipient.

Sec. 4. That in addition to the tax imposed by subdivision (*a*) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation, joint-stock company or association, or insurance company, subject to the tax imposed by that subdivision of that section, except that if it has fixed its own fiscal year, the tax imposed by this section for the fiscal year ending during the calendar year nineteen hundred and seventeen

shall be levied, assessed, collected, and paid only on that proportion of its income for such fiscal year which the period between January first, nineteen hundred and seventeen, and the end of such fiscal year bears to the whole of such fiscal year.

The tax imposed by this section shall be computed, levied, assessed, collected, and paid upon the same incomes and in the same manner as the tax imposed by subdivision (*a*) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, except that for the purpose of the tax imposed by this section the income embraced in a return of a corporation, joint-stock company or association, or insurance company, shall be credited with the amount received as dividends upon the stock or from the net earnings of any other corporation, joint-stock company or association, or insurance company, which is taxable upon its net income as provided in this title.

Sec. 5. That the provisions of this title shall not extend to Porto Rico or the Philippine Islands, and the Porto Rican or Philippine Legislature shall have power by due enactment to amend, alter, modify, or repeal the income tax laws in force in Porto Rico or the Philippine Islands, respectively.

TITLE II.—WAR EXCESS PROFITS TAX.

Sec. 200. That when used in this title—

The term "corporation" includes joint-stock companies or associations, and insurance companies;

The term "domestic" means created under the law of the United States or of any State, Territory, or District thereof, and the term "foreign" means created under the law of any other possession of the United States or of any foreign country or government;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "taxable year" means the twelve months ending December thirty-first, excepting in the case of a corporation or partnership which has fixed its own fiscal year, in which case it means such fiscal year. The first taxable year shall be the year ending December thirty-first, nineteen hundred and seventeen, except that in the case of a corporation or partnership which has fixed its own fiscal year, it shall be the fiscal year ending during the calendar year nineteen hundred and seventeen. If a corporation or partnership, prior to March first, nineteen hundred and eighteen, makes a return covering its own fiscal year, and includes therein the income received during that part of the fiscal year falling within the calendar year nineteen hundred and sixteen, the tax for such taxable year shall be that proportion of the tax computed upon the net income during such full fiscal year which the time from January first, nineteen hundred and seventeen, to the end of such fiscal year bears to the full fiscal year; and

The term "prewar period" means the calendar years nineteen hundred and eleven, nineteen hundred and twelve, and nineteen hundred and thirteen, or, if a corporation or partnership was not in existence or an individual was not engaged in a trade or business during the

whole of such period, then as many of such years during the whole of which the corporation or partnership was in existence or the individual was engaged in the trade or business.

The terms "trade" and "business" include professions and occupations.

The term "net income" means in the case of a foreign corporation or partnership or a non-resident alien individual, the net income received from sources within the United States.

Sec. 201. That in addition to the taxes under existing law and under this Act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:

Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital.

For the purpose of this title every corporation or partnership not exempt under the provisions of this section shall be deemed to be engaged in business, and all the trades and businesses in which it is engaged shall be treated as a single trade or business, and all its income from whatever source derived shall be deemed to be received from such trade or business.

This title shall apply to all trades or businesses of whatever description, whether continuously carried on or not, except—

(*a*) In the case of officers[1] and employees under the United States, or any State, territory, or the District of Columbia, or any local sub-division thereof, the compensation or fees received by them as such officers or employees;

(*b*) Corporations exempt from tax under the provisions of section eleven of Title I of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, and partnerships and individuals carrying on or doing the same business, or coming within the same description; and

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[1] In Lamar v. U. S. 241 U. S. 103, 60 L. Ed. 912 (1916), affirming 227 Fed. 1019, it was held that members of House of Representatives were "officers of U. S.," within false personation statute. Criminal Code, Sec. 32.

(c) Incomes derived from the business of life, health, and accident insurance combined in one policy issued on the weekly premium payment plan.

Sec. 202. That the tax shall not be imposed in the case of the trade or business of a foreign corporation or partnership or a nonresident alien individual, the net income of which trade or business during the taxable year is less than $3,000.

Sec. 203. That for the purpose of this title the deduction shall be as follows, except as otherwise in this title provided—

(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000;

(b) In the case of a domestic partnership or of a citizen or resident of the United States, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $6,000;

(c) In the case of a foreign corporation or partnership or of a non-resident alien individual, an amount ascertained in the same manner as provided in subdivisions (a) and (b), without any exemption of $3,000 or $6,000.

(d) If the Secretary of the Treasury is unable satisfactorily to determine the average amount of the annual net income of the trade or business during the prewar period, the deduction shall be determined in the same manner as provided in section two hundred and five.

Sec. 204. That if a corporation or partnership was not in existence, or an individual was not engaged in the trade or business, during the whole of any one calendar year during the prewar period, the deduction shall be an amount equal to eight per centum of the invested capital for the taxable year, plus in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

A trade or business carried on by a corporation, partnership, or individual, although formally organized or reorganized on or after January second, nineteen hundred and thirteen, which is substantially a continuation of a trade or business carried on prior to that date, shall, for the purpose of this title, be deemed to have been in existence prior to that date, and the net income and invested capital of its predecessor prior to that date shall be deemed to have been its net income and invested capital.

Sec. 205. (a) That if the Secretary of the Treasury, upon complaint finds either (1) that during the prewar period a domestic corporation or partnership, or a citizen or resident of the United States, had no net income from the trade or business, or (2) that during the prewar period the percentage, which the net income was of the invested capital, was low as compared with the percentage, which the net income during such period of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, was of their invested capital, then the deduction shall be the sum of (1) an amount equal to the same percentage of its invested capital for the taxable year which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for such year of representative corporations, partnerships or individuals, engaged in a like or similar trade or business, is of their average invested capital for such year, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

The percentage which the net income was of the invested capital in each trade or business shall be determined by the Commissioner of Internal Revenue, in accordance with the regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the percentage determined for the calendar year ending during such fiscal year shall be used.

(*b*) The tax shall be assessed upon the basis of the deduction determined as provided in section two hundred and three, but the taxpayer claiming the benefit of this section may at the time of making the return file a claim for abatement of the amount by which the tax so assessed exceeds a tax computed upon the basis of the deduction determined as provided in this section. In such event, collection of the part of the tax covered by such claim for abatement shall not be made until the claim is decided, but if in the judgment of the Commissioner of Internal Revenue, the interests of the United States would be jeopardized thereby he may require the claimant to give a bond in such amount and with such sureties as the Commissioner may think wise to safeguard such interests, conditioned for the payment of any tax found to be due, with the interest thereon, and if such bond, satisfactory to the Commissioner is not given within such time as he prescribes, the full amount of tax assessed shall be collected and the amount overpaid, if any, shall upon final decision of the application be refunded as a tax erroneously or illegally collected.

Sec. 206. That for the purposes of this title the net income of a corporation shall be ascertained and returned (*a*) for the calendar years nineteen hundred and eleven and nineteen hundred and twelve upon the same basis and in the same manner as provided in section thirty-eight of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August fifth, nineteen hundred and nine,

except that income taxes paid by it within the year imposed by the authority of the United States shall be included; (*b*) for the calendar year nineteen hundred and thirteen upon the same basis and in the same manner as provided in section II of the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October third, nineteen hundred and thirteen, except that income taxes paid by it within the year imposed by the authority of the United States shall be included, and except that the amounts received by it as dividends upon the stock or from the net earnings of other corporations, joint-stock companies or associations, or insurance companies, subject to the tax imposed by section II of such Act of October third, nineteen hundred and thirteen, shall be deducted; and (*c*) for the taxable year upon the same basis and in the same manner as provided in Title I of the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, as amended by this Act, except that the amounts received by it as dividends upon the stock or from the net earnings of other corporations, joint-stock companies or associations, or insurance companies, subject to the tax imposed by Title I of such Act of September eighth, nineteen hundred and sixteen, shall be deducted.

The net income of a partnership or individual shall be ascertained and returned for the calendar years nineteen hundred and eleven, nineteen hundred and twelve, and nineteen hundred and thirteen, and for the taxable year, upon the same basis and in the same manner as provided in Title I of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, except that the credit allowed by subdivision (*b*) of section five of such Act shall be deducted. There shall be allowed (*a*) in the case of a domestic partnership the same deductions as allowed to individuals in subdivision (*a*) of section five of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act; and (*b*) in the case of a foreign partnership the same deductions as allowed to individuals in subdivision (*a*) of section six of such Act as amended by this Act.

Sec. 207. That as used in this title the term "invested capital" for any year means the average invested capital for the year, as defined and limited in this title, averaged monthly.

As used in this title "invested capital" does not include stocks, bonds (other than obligations of the United States), or other assets, the income from which is not subject to the tax imposed by this title, nor money or other property borrowed, and means, subject to the above limitations:

(*a*) In the case of a corporation or partnership: (1) actual cash paid in, (2) the actual cash value of tangible property paid in other than cash, for stock or shares in such corporation or partnership, at the time of such payment (but in case such tangible property was paid prior to January first, nineteen hundred and fourteen, the actual cash value of such property as of January first, nineteen hundred and fourteen, but in no case to exceed the par value of the original stock or shares specifically issued therefor), and (3) paid in

or earned surplus and undivided profits used or employed in the business, exclusive of undivided profits earned during the taxable year; *Provided*, That (*a*) the actual cash value of patents and copyrights paid in for stock or shares in such corporation or partnership, at the time of such payment, shall be included as invested capital, but not to exceed the par value of such stock or shares at the time of such payment, and (*b*) the good will, trade marks, trade brands, the franchise of a corporation or partnership, or other intangible property, shall be included as invested capital if the corporation or partnership made payment bona fide therefor specifically as such in cash or tangible property, the value of such good will, trade mark, trade brand, franchise, or intangible property, not to exceed the actual cash or actual cash value of the tangible property paid therefor at the time of such payment; but good will, trade marks, trade brands, franchise of a corporation or partnership, or other intangible property, bona fide purchased, prior to March third, nineteen hundred and seventeen, for and with interests or shares in a partnership or for and with shares in the capital stock of a corporation (issued prior to March third, nineteen hundred and seventeen), in an amount not to exceed, on March third, nineteen hundred and seventeen, twenty per centum of the total interests or shares in the partnership or of the total shares of the capital stock of the corporation, shall be included in invested capital at a value not to exceed the actual cash value at the time of such purchase, and in case of issue of stock therefor not to exceed the par value of such stock;

(*b*) In the case of an individual, (1) actual cash paid into the trade or business, and (2) the actual cash value of tangible property paid into the trade or business, other than cash, at the time of such payment (but in case such tangible property was paid in prior to January first, nineteen hundred and fourteen, the actual cash value of such property as of January first, nineteen hundred and fourteen), and (3) the actual cash value of patents, copyrights, good will, trade marks, trade brands, franchises, or other intangible property, paid into the trade or business, at the time of such payment, if payment was made therefor specifically as such in cash or tangible property, not to exceed the actual cash or actual cash value of the tangible property bona fide paid therefor at the time of such payment.

In the case of a foreign corporation or partnership or of a nonresident alien individual the term "invested capital" means that proportion of the entire invested capital, as defined and limited in this title, which the net income from sources within the United States bears to the entire net income.

Sec. 208. That in case of the reorganization, consolidation, or change of ownership of a trade or business after March third, nineteen hundred and seventeen, if an interest or control in such trade or business of fifty per centum or more remains in control of the same persons, corporations, associations, partnerships, or any of them, then in ascertaining the invested capital of the trade or business no asset transferred or received from the prior trade or business

shall be allowed a greater value than would have been allowed under this title in computing the invested capital of such prior trade or business if such asset had not been so transferred or received, unless such asset was paid for specifically as such, in cash or tangible property, and then not to exceed the actual cash or actual cash value of the tangible property paid therefor at the time of such payment.

Sec. 209. That in the case of a trade or business having no invested capital or not more than a nominal capital there shall be levied, assessed, collected, and paid, in addition to the taxes under existing law and under this act, in lieu of the tax imposed by section two hundred and one, a tax equivalent to eight per centum of the net income of such trade or business, in excess of the following deductions: in the case of a domestic corporation, $3,000, and in the case of a domestic partnership, or a citizen or resident of the United States, $6,000, in the case of all other trades or business, no deduction.

Sec. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Sec. 211. That every foreign partnership having a net income of $3,000 or more for the taxable year, and every domestic partnership having a net income of $6,000 or more for the taxable year, shall render a correct return of the income of the trade or business for the taxable year, setting forth specifically the gross income for such year, and the deductions allowed in this title. Such returns shall be rendered at the same time and in the same manner as is prescribed for income tax returns under Title I of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act.

Sec. 212. That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal revenue taxes not heretofore spe-

cifically repealed and not inconsistent with the provisions of this title, are hereby extended and made applicable to all the provisions of this title and to the tax herein imposed, and all provisions of Title I of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, relating to returns and payment of the tax therein imposed, including penalties, are hereby made applicable to the tax imposed by this title.

Sec. 213. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all necessary regulations for carrying out the provisions of this title, and may require any corporation, partnership, or individual, subject to the provisions of this title, to furnish him with such facts, data, and information as in his judgment are necessary to collect the tax imposed by this title.

Sec. 214. That Title II (sections two hundred to two hundred and seven, inclusive) of the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy, and the extensions of fortifications, and for other purposes," approved March third, nineteen hundred and seventeen, is hereby repealed.

Any amount heretofore or hereafter paid on account of the tax imposed by such Title II, shall be credited toward the payment of the tax imposed by this title, and if the amount so paid exceeds the amount of such tax the excess shall be refunded as a tax erroneously or illegally collected.

Subdivision (1) of section three hundred and one of such Act of September eighth, nineteen hundred and sixteen, is hereby amended so that the rate of tax for the taxable year nineteen hundred and seventeen shall be ten per centum instead of twelve and one-half per centum as therein provided.

Subdivision (2) of such section is hereby amended to read as follows:

"(2) This section shall cease to be of effect on and after January first, nineteen hundred and eighteen."

TITLE III.—WAR TAX ON BEVERAGES.

Sec. 300. That on and after the passage of this Act there shall be levied and collected on all distilled spirits in bond at that time or that have been or that may be then or thereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section three hundred and three, in addition to the tax now imposed by law, a tax of $1.10 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $2.10) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn and collected under the provisions of existing law.

That in addition to the tax under existing law there shall be levied and collected upon all perfumes hereafter imported into the United States containing distilled spirits, a tax of $1.10 per wine gallon, and a proportionate tax at a like rate on all fractional parts of such wine gallon. Such tax shall be collected by the collector of customs and deposited as internal revenue collections, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

Sec. 301. That no distilled spirits produced after the passage of this Act shall be imported into the United States from any foreign country, or from the West Indian Islands recently acquired from Denmark (unless produced from products the growth of such islands, and not then into any State or Territory or District of the United States in which the manufacture or sale of intoxicating liquor is prohibited), or from Porto Rico, or the Philippine Islands. Under such rules, regulations, and bonds as the Secretary of the Treasury may prescribe, the provisions of this section shall not apply to distilled spirits imported for other than (1) beverage purposes or, (2) use in the manufacture or production of any article used or intended for use as a beverage.

Sec. 302. That at registered distilleries producing alcohol, or other high-proof spirits, packages may be filled with such spirits reduced to not less than one hundred proof from the receiving cisterns and tax paid without being entered into bonded warehouse. Such spirits may be also transferred from the receiving cisterns at such distilleries, by means of pipe lines, direct to storage tanks in the bonded warehouse and may be warehoused in such storage tanks. Such spirits may be also transferred in tanks or tank cars to general bonded warehouses for storage therein, either in storage tanks in such warehouses or in the tanks in which they were transferred. Such spirits may also be transferred after tax payment from receiving cisterns or warehouse storage tanks to tanks or tank cars and may be transported in such tanks or tank cars to the premises of rectifiers of spirits. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby empowered to prescribe all necessary regulations relating to the drawing off, transferring, gauging, storing and transporting of such spirits; the records to be kept and returns to be made; the size and kind of packages and tanks to be used; the marking, branding, numbering and stamping of such packages and tanks; the kinds of stamps, if any, to be used; and the time and manner of paying the tax; the kind of bond and the penal sum of same. The tax prescribed by law must be paid before such spirits are removed from the distillery premises, or from general bonded warehouse in the case of spirits transferred thereto, except as otherwise provided by law.

Under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, distilled spirits may hereafter be drawn from receiving cisterns and deposited in distillery warehouses without having affixed to the packages containing the same distillery warehouse stamps, and such

packages, when so deposited in warehouse, may be withdrawn therefrom on the original gauge where the same have remained in such warehouse for a period not exceeding thirty days from the date of deposit.

Under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, the manufacturer, warehousing, withdrawal, and shipment, under the provisions of existing law, of ethyl alcohol for other than (1) beverage purposes or (2) use in the manufacture or production of any article used or intended for use as a beverage and denatured alcohol, may be exempted from the provisions of section thirty-two hundred and eighty-three, Revised Statutes of the United States.

Under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, manufacturers of ethyl alcohol for other than beverage purposes may be granted permission under the provisions of section thirty-two hundred and eighty-five, Revised Statutes of the United States, to fill fermenting tubs in a sweet-mash distillery not oftener than once in forty-eight hours.

Sec. 303. That upon all distilled spirits produced in or imported into the United States upon which the tax now imposed by law has been paid, and which, on the day this Act is passed, are held by a retailer in a quantity in excess of fifty gallons in the aggregate, or by any other person, corporation, partnership, or association in any quantity, and which are intended for sale, there shall be levied, assessed, collected, and paid a tax of $1.10 (or, if intended for sale for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $2.10) on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon: *Provided*, That the tax on such distilled spirits in the custody of a court of bankruptcy in insolvency proceedings on June first, nineteen hundred and seventeen, shall be paid by the person to whom the court delivers such distilled spirits at the time of such delivery, to the extent that the amount thus delivered exceeds the fifty gallons herein before provided.

Sec. 304. That in addition to the tax now imposed or imposed by this Act on distilled spirits there shall be levied, assessed, collected, and paid a tax of 15 cents on each proof gallon and a proportionate tax at a like rate on all fractional parts of such proof gallon on all distilled spirits or wines hereafter rectified, purified, or refined in such manner, and on all mixtures hereafter produced in such manner, that the person so rectifying, purifying, refining, or mixing the same is a rectifier within the meaning of section thirty-two hundred and forty-four, Revised Statutes, as amended, and on all such articles in the possession of the rectifier on the day this Act is passed: *Provided*, That this tax shall not apply to gin produced by the redistillation of a pure spirit over juniper berries and other aromatics.

When the process of rectification is completed and the tax prescribed by this section has been paid, it shall be unlawful for the

rectifier or other dealer to reduce in proof or increase in volume such spirits or wine by the addition of water or other substance; nothing herein contained shall, however, prevent a rectifier from using again in the process of rectification spirits already rectified and upon which the tax has theretofore been paid.

The tax imposed by this section shall not attach to cordials or liqueurs on which a tax is imposed and paid under the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, nor to the mixing and blending of wines, where such blending is for the sole purpose of perfecting such wines according to commercial standards, nor to blends made exclusively of two or more pure straight whiskies aged in wood for a period not less than four years and without the addition of coloring or flavoring matter or any other substance than pure water and if not reduced below ninety proof: *Provided*, That such blended whiskies shall be exempt from tax under this section only when compounded under the immediate supervision of a revenue officer, in such tanks and under such conditions and supervision as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury may prescribe.

All distilled spirits taxable under this section shall be subject to uniform regulations concerning the use thereof in the manufacture, blending, compounding, mixing, marking, branding, and sale of whiskey and rectified spirits, and no discrimination whatsoever shall be made by reason of a difference in the character of the material from which same may have been produced.

The business of a rectifier of spirits shall be carried on, and the tax on rectified spirits shall be paid, under such rules, regulations, and bonds as may be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

Any person violating any of the provisions of this section shall be deemed to be guilty of a misdemeanor and, upon conviction, shall be fined not more than $1,000 or imprisoned not more than two years. He shall, in addition, be liable to double the tax evaded, together with the tax, to be collected by assessment or on any bond given.

Sec. 305. That hereafter collectors of internal revenue shall not furnish wholesale liquor dealers' stamps in lieu of and in exchange for stamps for rectified spirits unless the package covered by stamp for rectified spirits is to be broken into smaller packages.

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to discontinue the use of the following stamps whenever in his judgment the interests of the Government will be subserved thereby:

Distillery warehouse, special bonded warehouse, special bonded rewarehouse, general bonded warehouse, general bonded retransfer, transfer brandy, export tobacco, export cigars, export oleomargarine and export fermented liquor stamps.

Sec. 306. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to require at distilleries, breweries, rectifying houses, and wherever else

in his judgment such action may be deemed advisable, the installation of meters, tanks, pipes, or any other apparatus for the purpose of protecting the revenue, and such meters, tanks and pipes and all necessary labor incident thereto shall be at the expense of the person, corporation, partnership, or association on whose premises the installation is required. Any such person, corporation, partnership, or association refusing or neglecting to install such apparatus when so required by the commissioner shall not be permitted to conduct business on such premises.

Sec. 307. That on and after the passage of this Act there shall be levied and collected on all beer, lager beer, ale, porter, and other similar fermented liquor, containing one-half per centum or more of alcohol, brewed or manufactured and sold, or stored in warehouse, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, in addition to the tax now imposed by law, a tax of $1.50 for every barrel containing not more than thirty-one gallons, and at a like rate for any other quantity or for the fractional parts of a barrel authorized and defined by law.

Sec. 308. That from and after the passage of this Act taxable fermented liquors may be conveyed without payment of tax from the brewery premises where produced to a contiguous industrial distillery of either class established under the Act of October third, nineteen hundred and thirteen, to be used as distilling material, and the residue from such distillation, containing less than one-half of one per centum of alcohol by volume, which is to be used in making beverages, may be manipulated by cooling, flavoring, carbonating, settling, and filtering on the distillery premises or elsewhere.

The removal of the taxable fermented liquor from the brewery to the distillery and the operation of the distillery and removal of the residue therefrom shall be under the supervision of such officer or officers as the Commissioner of Internal Revenue shall deem proper, and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to make such regulations from time to time as may be necessary to give force and effect to this section and to safeguard the revenue.

Sec. 309. That upon all still wines, including vermuth, and upon all champagne and other sparkling wines, liqueurs, cordials, artificial or imitation wines or compounds sold as wine, produced in or imported into the United States, and hereafter removed from the custom-house, place of manufacture, or from bonded premises for sale or consumption, there shall be levied and collected, in addition to the tax now imposed by law upon such articles, a tax equal to such tax, to be levied, collected, and paid under the provisions of existing law.

Sec. 310. That upon all articles specified in section three hundred and nine upon which the tax now imposed by law has been paid and which are on the day this Act is passed held in excess of twenty-five gallons in the aggregate of such articles and intended for sale, there

shall be levied, collected, and paid a tax equal to the tax imposed by such section.

Sec. 311. That upon all grape brandy or wine spirits withdrawn by a producer of wines from any fruit distillery or special bonded warehouse under subdivision (c) of section four hundred and two of the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, there shall be levied, assessed, collected, and paid in addition to the tax therein imposed, a tax equal to double such tax, to be assessed, collected, and paid under the provisions of existing law.

Sec. 312. That upon all sweet wines held for sale by the producer thereof upon the day this Act is passed there shall be levied, assessed, collected, and paid an additional tax equivalent to 10 cents per proof gallon upon the grape brandy or wine spirits used in the fortification of such wine, and an additional tax of 20 cents per proof gallon shall be levied, assessed, collected, and paid upon all grape brandy or wine spirits withdrawn by a producer of sweet wines for the purpose of fortifying such wines and not so used prior to the passage of this Act.

Sec. 313. That there shall be levied, assessed, collected, and paid—

(a) Upon all prepared syrups or extracts (intended for use in the manufacture or production of beverages, commonly known as soft drinks, by soda fountains, bottling establishments, and other similar places) sold by the manufacturer, producer, or importer thereof, if so sold for not more than $1.30 per gallon, a tax of 5 cents per gallon; if so sold for more than $1.30 and not more than $2 per gallon, a tax of 8 cents per gallon; if so sold for more than $2 and not more than $3 per gallon, a tax of 10 cents per gallon; if so sold for more than $3 and not more than $4 per gallon, a tax of 15 cents per gallon; and if so sold for more than $4 per gallon, a tax of 20 cents per gallon; and

(b) Upon all fermented grape juice, soft drinks, or artificial mineral waters (not carbonated), and fermented liquors containing less than one-half per centum of alcohol, sold by the manufacturer, producer, or importer thereof, in bottles or other closed containers, and upon all ginger ale, root beer, sarsaparilla, pop, and other carbonated waters or beverages, manufactured and sold by the manufacturer, producer, or importer of the carbonic acid gas used in carbonating the same, a tax of 1 cent per gallon; and

(c) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 1 cent per gallon.

Sec. 314. That each such manufacturer, producer, bottler, or importer shall make monthly returns under oath to the collector of internal revenue for the district in which is located the principal place of business, containing such information necessary for the assessment of the tax, and at such times and in such manner, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe.

Sec. 315. That upon all carbonic acid gas in drums or other containers (intended for use in the manufacture or production of carbonated water or other drinks) sold by the manufacturer, producer, or importer thereof, there shall be levied, assessed, collected, and paid a tax of 5 cents per pound. Such tax shall be paid by the purchaser to the vendor thereof and shall be collected, returned, and paid to the United States by such vendor in the same manner as provided in section five hundred and three.

TITLE IV.—WAR TAX ON CIGARS, TOBACCO, AND MANUFACTURES THEREOF.

Sec. 400. That upon cigars and cigarettes, which shall be manufactured and sold, or removed for consumption or sale, there shall be levied and collected, in addition to the taxes now imposed by existing law, the following taxes, to be paid by the manufacturer or importer thereof: (*a*) on cigars of all descriptions made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, 25 cents per thousand; (*b*) on cigars made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, if manufactured or imported to retail at 4 cents or more each, and not more than 7 cents each, $1 per thousand; (*c*) if manufactured or imported to retail at more than 7 cents each and not more than 15 cents each, $3 per thousand; (*d*) if manufactured or imported to retail at more than 15 cents each and not more than 20 cents each, $5 per thousand; (*e*) if manufactured or imported to retail at more than 20 cents each, $7 per thousand: *Provided*, That the word "*retail*" as used in this section shall mean the ordinary retail price of a single cigar, and that the Commissioner of Internal Revenue may, by regulation, require the manufacturer or importer to affix to each box or container a conspicuous label indicating by letter the clause of this section under which the cigars therein contained have been tax-paid, which must correspond with the tax-paid stamp on said box or container; (*f*) on cigarettes made of tobacco, or any substitute therefor, made in or imported into the United States, and weighing not more than three pounds per thousand, 80 cents per thousand; weighing more than three pounds per thousand, $1.20 per thousand.

Every manufacturer of cigarettes (including small cigars weighing not more than three pounds per thousand) shall put up all the cigarettes and such small cigars that he manufactures or has manufactured for him, and sells or removes for consumption or use, in packages or parcels containing five, eight, ten, twelve, fifteen, sixteen, twenty, twenty-four, forty, fifty, eighty, or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon and shall properly cancel the same prior to such sale or removal for consumption or use under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all cigarettes imported from a foreign country shall be packed, stamped, and the stamps canceled in a like manner, in addition to the import stamp indicating inspection of the custom-house before they are withdrawn therefrom.

Sec. 401. That upon all tobacco and snuff hereafter manufactured and sold, or removed for consumption or use, there shall be levied and collected, in addition to the tax now imposed by law upon such articles, a tax of 5 cents per pound, to be levied, collected, and paid under the provisions of existing law.

In addition to the packages provided for under existing law, manufactured tobacco and snuff may be put up and prepared by the manufacturer for sale or consumption, in packages of the following description: Packages containing one-eighth, three-eighths, five-eighths, seven-eighths, one and one-eighth, one and three-eighths, one and five-eighths, one and seven-eighths, and five ounces.

Sec. 402. That sections four hundred, four hundred and one, and four hundred and four, shall take effect thirty days after the passage of this act: *Provided*, That after the passage of this Act and before the expiration of the aforesaid thirty days, cigarettes and manufactured tobacco and snuff may be put up in the packages now provided for by law or in the packages provided for in sections four hundred and four hundred and one.

Sec. 403. That there shall also be levied and collected, upon all manufactured tobacco and snuff in excess of one hundred pounds or upon cigars or cigarettes in excess of one thousand, which were manufactured or imported, and removed from factory or custom-house prior to the passage of this Act, bearing tax-paid stamps affixed to such articles for the payment of the taxes thereon, and which are, on the day after this Act is passed, held and intended for sale by any person, corporation, partnership, or association, and upon all manufactured tobacco, snuff, cigars, or cigarettes, removed from factory or customs-house after the passage of this Act but prior to the time when the tax imposed by section four hundred or section four hundred and one upon such articles takes effect, an additional tax equal to one-half the tax imposed by such sections upon such articles.

Sec. 404. That there shall be levied, assessed, and collected upon cigarette paper made up into packages, books, sets, or tubes, made up in or imported into the United States and intended for use by the smoker in making cigarettes the following taxes: On each package, book, or set, containing more than twenty-five, but not more than fifty papers, one-half of 1 cent; containing more than fifty but not more than one hundred papers, 1 cent; containing more than one hundred papers, 1 cent for each one hundred papers or fractional part thereof; and upon tubes, 2 cents for each one hundred tubes or fractional part thereof.

TITLE V.—WAR TAX ON FACILITIES FURNISHED BY PUBLIC UTILITIES AND INSURANCE.

Sec. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected and paid (*a*) a tax equivalent to three per centum of the amount paid for the transportation by rail or water or by any form of mechanical

motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another; (*b*) a tax of 1 cent for each 20 cents, or fraction thereof, paid to any person, corporation, partnership, or association, engaged in the business of transporting parcels or packages by express over regular routes between fixed terminals, for the transportation of any package, parcel, or shipment by express from one point in the United States to another: *Provided*, That nothing herein contained shall be construed to require the carrier collecting such tax to list separately in any bill of lading, freight receipt, or other similar document, the amount of the tax herein levied, if the total amount of the freight and tax be therein stated; (*c*) a tax equivalent to eight per centum of the amount paid for the transportation of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water, from one point in the United States to another or to any point in Canada or Mexico, where the ticket therefor is sold or issued in the United States, not including the amount paid for commutation or season tickets for trips less than thirty miles, or for transportation the fare for which does not exceed 35 cents, and a tax equivalent to ten per centum of the amount paid for seats, berths, and staterooms in parlor cars, sleeping cars, or on vessels. If a mileage book used for such transportation or accommodation has been purchased before this section takes effect, or if cash fare be paid the tax imposed by this section shall be collected from the person presenting the mileage book, or paying the cash fare, by the conductor or other agent, when presented for such transportation or accommodation, and the amount so collected shall be paid to the United States in such manner and at such times as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe; if a ticket (other than a mileage book) is bought and partially used before this section goes into effect it shall not be taxed, but if bought but not so used before this section takes effect, it shall not be valid for passage until the tax has been paid and such payment evidenced on the ticket in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe; (*d*) a tax equivalent to five per centum of the amount paid for the transportation of oil by pipe line; (*e*) a tax of 5 cents upon each telegraph, telephone, or radio, dispatch, message, or conversation, which originates within the United States, and for the transmission of which a charge of 15 cents or more is imposed: *Provided*, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons, corporations, partnerships, or associations shall be used for the transmission of such dispatch, message, or conversation.

Sec. 501. That the taxes imposed by section five hundred shall be paid by the person, corporation, partnership, or association paying for the services or facilities rendered.

In case such carrier does not, because of its ownership of the commodity transported, or for any other reason, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the trans-

portation of such commodity if the carrier received payment for such transportation: *Provided*, That in case of a carrier which on May first, nineteen hundred and seventeen, had no rates or tariffs on file with the proper Federal or State authority, the tax shall be computed on the basis of the rates or tariffs of other carriers for like services as ascertained and determined by the Commissioner of Internal Revenue: *Provided, further*, That nothing in this or the preceding section shall be construed as imposing a tax (*a*) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (*b*) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system.

Sec. 502. That no tax shall be imposed under section five hundred upon any payment received for services rendered to the United States. or any State, Territory, or the District of Columbia. The right to exemption under this section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe.

Sec. 503. That each person, corporation, partnership, or association receiving any payments referred to in section five hundred shall collect the amount of the tax, if any, imposed by such section from the person, corporation, partnership, or association making such payments, and shall make monthly returns under oath, in duplicate, and pay the taxes so collected and the taxes imposed upon it under paragraph two of section five hundred and one to the collector of internal revenue of the district in which the principal office or place of business is located. Such returns shall contain such information, and be made in such manner, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe.

Sec. 504. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid the following taxes on the issuance of insurance policies:

(a) Life insurance: A tax equivalent to 8 cents on each $100 or fractional part thereof of the amount for which any life is insured under any policy of insurance, or other instrument, by whatever name the same is called: *Provided*, That on all policies for life insurance only by which a life is insured not in excess of $500, issued on the industrial or weekly payment plan of insurance, the tax shall be forty per centum of the amount of the first weekly premium: *Provided further*, That policies of reinsurance shall be exempt from the tax imposed by this subdivision;

(*b*) Marine, inland, and fire insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or other instrument by whatever name the same is called whereby insurance is made or renewed upon property of any description (including rents or profits), whether against

peril by sea or inland waters, or by fire or lightning, or other peril: *Provided*, That policies of reinsurance shall be exempt from the tax imposed by this subdivision.

(*c*) Casualty insurance: A tax equivalent to 1 cent on each dollar or fractional part thereof of the premium charged under each policy of insurance or obligation of the nature of indemnity for loss, damage, or liability (except bonds taxable under subdivision two of Schedule A of Title VIII) issued or executed or renewed by any person, corporation, partnership, or association, transacting the business of employer's liability, workmen's compensation, accident, health, tornado, plate glass, steam boiler, elevator, burglary, automatic sprinkler, automobile, or other branch of insurance (except life insurance, and insurance described and taxed in the preceding subdivision): *Provided*, That policies of reinsurance shall be exempt from the tax imposed by this subdivision;

(d) Policies issued by any person, corporation, partnership, or association, whose income is exempt from taxation under Title I of the Act, entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, shall be exempt from the taxes imposed by this section.

Sec. 505. That every person, corporation, partnership, or association, issuing policies of insurance upon the issuance of which a tax is imposed by section five hundred and four, shall, within the first fifteen days of each month, make return under oath, in duplicate, and pay such tax to the collector of Internal Revenue of the district in which the principal office or place of business of such person, corporation, partnership, or association is located. Such returns shall contain such information and be made in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe.

TITLE VI.—WAR EXCISE TAXES.

Sec. 600. That there shall be levied, assessed, collected, and paid—

(*a*) Upon all automobiles, automobile trucks, automobile wagons, and motorcycles, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold; and

(*b*) Upon all piano players, graphophones, phonographs, talking machines, and records used in connection with any musical instrument, piano player, graphophone, phonograph, or talking machine, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold; and

(*c*) Upon all moving-picture films (which have not been exposed) sold by the manufacturer or importer, a tax equivalent to one-fourth of 1 cent per linear foot; and

(*d*) Upon all positive moving-picture films (containing a picture ready for projection) sold or leased by the manufacturer, producer, or importer, a tax equivalent to one-half of 1 cent per linear foot; and

(e) Upon any article commonly or commercially known as jewelry, whether real or imitation, sold by the manufacturer, producer, or importer thereof, a tax equivalent to three per centum of the price for which so sold; and

(*f*) Upon all tennis rackets, golf clubs, baseball bats, lacrosse sticks, balls of all kinds, including baseballs, foot balls, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games, except playing cards and children's toys and games, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold; and

(*g*) Upon all perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes, dentifrices, tooth pastes, aromatic cachous, toilet soaps and powders, or any similar substance, article, or preparation by whatsoever name known or distinguished, upon all of the above which are used or applied or intended to be used or applied for toilet purposes, and which are sold by the manufacturer, importer, or producer, a tax equivalent to two per centum of the price for which so sold; and

(*h*) Upon all pills, tablets, powders, tinctures, troches or lozenges sirups, medicinal cordials or bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters (except those taxed under section three hundred and thirteen of this Act), essences, spirits, oils, and all medicinal preparations, compounds, or compositions whatsoever, the manufacturer or producer of which claims to have any private formula, secret, or occult art for making or preparing the same, or has or claims to have any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or trade mark, or which, if prepared by any formula, published or unpublished, are held out or recommended to the public by the makers, vendors, or proprietors thereof as proprietary medicines or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body, and which are sold by the manufacturer, producer, or importer, a tax equivalent to two per centum of the price for which so sold; and

(*i*) Upon all chewing gum or substitute therefor sold by the manufacturer, producer, or importer, a tax equivalent to two per centum of the price for which so sold; and

(*j*) Upon all cameras sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold.

Sec. 601. That each manufacturer, producer, or importer of any of the articles enumerated in section six hundred shall make monthly returns under oath in duplicate and pay the taxes imposed on such articles by this title to the collector of internal revenue for the district in which is located the principal place of business. Such returns

shall contain such information and be made at such times and in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe.

Sec. 602. That upon all articles enumerated in subdivisions (*a*), (*b*), (*e*), (*f*), (*g*), (*h*), (*i*), or (*j*) of section six hundred, which on the day this Act is passed are held and intended for sale by any person, corporation, partnership, or association, other than (1) a retailer who is not also a wholesaler, or (2) the manufacturer, producer, or importer thereof, there shall be levied, assessed, collected, and paid, a tax equivalent to one-half the tax imposed by each such subdivision upon the sale of the articles therein enumerated. This tax shall be paid by the person, corporation, partnership, or association so holding such articles.

The taxes imposed by this section shall be assessed, collected, and paid in the same manner as provided in section ten hundred and two in the case of additional taxes upon articles upon which the tax imposed by existing law has been paid.

Nothing in this section shall be construed to impose a tax upon articles sold and delivered prior to May ninth, nineteen hundred and seventeen, where the title is reserved in the vendor as security for the payment of the purchase money.

Sec. 603. That on the day this Act takes effect, and thereafter on July first in each year, and also at the time of the original purchase of a new boat by a user, if on any other date than July first, there shall be levied, assessed, collected, and paid, upon the use of yachts, pleasure boats, power boats, and sailing boats, of over five net tons, and motor boats with fixed engines, not used exclusively for trade or national defense, or not built according to plans and specifications approved by the Navy Department, an excise tax to be based on each yacht or boat, at rates as follows: Yachts, pleasure boats, power boats, motor boats with fixed engines, and sailing boats, of over five net tons, length not over fifty feet, 50 cents for each foot, length over fifty feet and not over one hundred feet, $1 for each foot, length over one hundred feet, $2 for each foot; motor boats of not over five net tons with fixed engines, $5.

In determining the length of such yachts, pleasure boats, power boats, motor boats with fixed engines, and sailing boats, the measurement of over-all length shall govern.

In the case of a tax imposed at the time of the original purchase of a new boat on any other date than July first, the amount to be paid shall be the same number of twelfths of the amount of the tax as the number of calendar months, including the month of sale, remaining prior to the following July first.

TITLE VII.—War Tax on Admissions and Dues.

Sec. 700. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid, (*a*) a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by sea-

son ticket or subscription, to be paid by the person paying for such admission: *Provided*, That the tax on admission of children under twelve years of age where an admission charge for such children is made shall in every case be 1 cent; and (*b*) in the case of persons (except bona fide employees, municipal officers on official business, and children under twelve years of age) admitted free to any place at a time when and under circumstances under which an admission charge is made to other persons of the same class, a tax of 1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations, to be paid by the persons so admitted; and (*c*) a tax of 1 cent for each 10 cents or fraction thereof paid for admission to any public performance for profit at any cabaret or other similar entertainment to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be computed under rules prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, such tax to be paid by the person paying for such refreshment, service, or merchandise. In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement there shall be levied, assessed, collected, and paid a tax equivalent to ten per centum of the amount for which a similar box or seat is sold for performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder. These taxes shall not be imposed in the case of a place the maximum charge for admission to which is 5 cents, or in the case of shows, rides, and other amusements, (the maximum charge for admission to which is ten cents) within outdoor general amusement parks, or in the case of admissions to such parks.

No tax shall be levied under this title in respect to any admissions all the proceeds of which inure exclusively to the benefit of religous, educatonal, or charitable institutions, societies, or organizations, or admissions to agricultural fairs none of the profits of which are distributed to stockholders or members of the association conducting the same.

The term "admission" as used in this title includes seats and tables, reserved or otherwise, and other similar accommodations, and the charges made therefor.

Sec. 701. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid, a tax equivalent to ten per centum of any amount paid as dues or membership fees (including initiation fees), to any social, athletic, or sporting club or organization, where such dues or fees are in excess of $12 per year; such taxes to be paid by the person paying such dues or fees: provided, that there shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal beneficiary society, order, or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the pay-

ment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents.

Sec. 702. That every person, corporation, partnership, or association (*a*) receiving any payments for such admission, dues, or fees shall collect the amount of the tax imposed by section seven hundred or seven hundred and one from the person making such payments, or (*b*) admitting any person free to any place for admission to which a charge is made shall collect the amount of the tax imposed by section seven hundred from the person so admitted, and (*c*) in either case shall make returns and payments of the amounts so collected, at the same time and in the same manner as provided in section five hundred and three of this Act.

TITLE VIII.—WAR STAMP TAXES.

Sec. 800. That on and after the first day of December, nineteen hundred and seventeen, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person, corporation, partnership, or association who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule.

Sec. 801. That there shall not be taxed under this title any bond, note, or other instrument, issued by the United States, or by any foreign Government, or by any State, Territory or the District of Columbia, or local subdivision thereof, or municipal or other corporation exercising the taxing power, when issued in the exercise of a strictly governmental, taxing, or municipal function; or stocks and bonds issued by co-operative building and loan associations which are organized and operated exclusively for the benefit of their members and make loans only to their shareholders, or by mutual ditch or irrigating companies.

Sec. 802. That whoever—

(*a*) Makes, signs, issues, or accepts, or causes to be made, signed, issued, or accepted, any instrument, document, or paper of any kind or description whatsoever without the full amount of tax thereon being duly paid;

(*b*) Consigns or ships, or causes to be consigned or shipped, by parcel post any parcel, package, or article without the full amount of tax being duly paid;

(*c*) Manufactures or imports and sells, or offers for sale, or causes to be manufactured or imported and sold, or offered for sale, any playing cards, package, or other article without the full amount of tax being duly paid;

(*d*) Makes use of an adhesive stamp to denote any tax imposed by this title without canceling or obliterating such stamp as prescribed in section eight hundred and four;

Is guilty of a misdemeanor and upon conviction thereof shall pay a fine of not more than $100 for each offense.

Sec. 803. That whoever—

(a) Fraudulently cuts, tears, or removes from any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title, any adhesive stamp or the impression of any stamp, die, plate, or other article provided, made, or used in pursuance of this title; (*b*) Fraudulently uses, joins, fixes, or places to, with, or upon any vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title, (1) any adhesive stamp, or the impression of any stamp, die, plate, or other article, which has been cut, torn, or removed from any other vellum, parchment, paper, instrument, writing, package, or article, upon which any tax is imposed by this title or (2) any adhesive stamp or the impression of any stamp, die, plate, or other article of insufficient value; or (3) any forged or counterfeit stamp, or the impression of any forged or counterfeited stamp, die, plate, or other article;

(*c*) Willfully removes, or alters the cancellation, or defacing marks of, or otherwise prepares, any adhesive stamp, with intent to use, or cause the same to be used, after it has been already used, or knowingly or willfully buys, sells, offers for sale, or gives away, any such washed or restored stamp to any person for use, or knowingly uses the same;

(d) Knowingly and without lawful excuse (the burden of proof of such excuse being on the accused) has in possession any washed, restored, or altered stamp, which has been removed from any vellum, parchment, paper, instrument, writing, package, or article,

is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $1,000, or by imprisonment for not more than five years, or both, in the discretion of the court, and any such reused, canceled, or counterfeit stamp and the vellum, parchment, document, paper, package, or article upon which it is placed or impressed shall be forfeited to the United States.

Sec. 804. That whenever an adhesive stamp is used for denoting any tax imposed by this title, except as hereinafter provided, the person, corporation, partnership, or association, using or affixing the same shall write or stamp or cause to be written or stamped thereupon the initials of his or its name and the date upon which the same is attached or used, so that the same may not again be used: *Provided*, That the Commissioner of Internal Revenue may prescribe such other method for the cancellation of such stamps as he may deem expedient.

Sec. 805. (a) That the Commissioner of Internal Revenue shall cause to be prepared and distributed for the payment of the taxes pre-

scribed in this title suitable stamps denoting the tax on the document, articles, or things to which the same may be affixed, and shall prescribe such method for the affixing of said stamps in substitution for or in addition to the method provided in this title, as he may deem expedient.

(*b*) The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to procure any of the stamps provided for in this title by contract whenever such stamps can not be speedily prepared by the Bureau of Engraving and Printing; but this authority shall expire on the first day of January, nineteen hundred and eighteen, except as to imprinted stamps furnished under contract, authorized by the Commissioner of Internal Revenue.

(*c*) All internal-revenue laws relating to the assessment and collection of taxes are hereby extended to and made a part of this title, so far as applicable, for the purpose of collecting stamp taxes omitted through mistake or fraud from any instrument, document, paper, writing, parcel, package, or article named herein.

Sec. 806. That the Commissioner of Internal Revenue shall furnish to the Postmaster General without prepayment a suitable quantity of adhesive stamps to be distributed to and kept on sale by the various postmasters in the United States. The Postmaster General may require each such postmaster to give additional or increased bond as postmaster for the value of the stamps so furnished, and each such postmaster shall deposit the receipts from the sale of such stamps to the credit of and render accounts to the Postmaster General at such times and in such form as he may by regulations prescribe. The Postmaster General shall at least once monthly transfer all collections from this source to the Treasury as internal-revenue collections.

Sec. 807. That the collectors of the several districts shall furnish without prepayment to any assistant treasurer or designated depository of the United States located in their respective collection districts a suitable quantity of adhesive stamps for sale. In such cases the collector may require a bond, with sufficient sureties, to an amount equal to the value of the adhesive stamps so furnished, conditioned for the faithful return, whenever so required, of all quantities or amounts undisposed of, and for the payment monthly of all quantities or amounts sold or not remaining on hand. The Secretary of the Treasury may from time to time make such regulations as he may find necessary to insure the safe-keeping or prevent the illegal use of all such adhesive stamps.

SCHEDULE A.—STAMP TAXES.

1. Bonds of indebtedness: Bonds, debentures, or certificates of indebtedness issued on and after the first day of December, nineteen hundred and seventeen, by any person, corporation, partnership or association, on each $100 of face value or fraction thereof, 5 cents: *Provided*, That every renewal of the foregoing shall be taxed as a new issue: *Provided further*, That when a bond conditioned for the re-

payment or payment of money is given in a penal sum greater than the debt secured, the tax shall be based upon the amount secured.

2. Bonds, indemnity and surety: Bonds for indemnifying any person, corporation, partnership, or corporation who shall have become bound or engaged as surety, and all bonds for the due execution or performance of any contract, obligation, or requirement, or the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, 50 cents: *Provided*, That where a premium is charged for the execution of such bonds the tax shall be paid at the rate of one per centum on each dollar or fractional part thereof of the premium charged: *Provided further*, That policies of reinsurance shall be exempt from the tax imposed by this subdivision.

3. Capital stock, issue: On each original issue, whether on organization or reorganization, of certificates of stock by any association, company, or corporation, on each $100 of face value or fraction thereof, 5 cents: Provided, That where capital stock is issued without face value, the tax shall be 5 cents per share, unless the actual value is in excess of $100 per share, in which case the tax shall be 5 cents on each $100 of actual value or fraction thereof.

The stamps representing the tax imposed by this subdivision shall be attached to the stock books and not to the certificates issued.

4. Capital stock, sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal titles to shares of certificates of stock in any association, company, or corporation, whether made upon or shown by the books of the association, company, or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares of stock are without par value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share, unless the actual value thereof is in excess of $100 per share, in which case the tax shall be 2 cents on each $100 of actual value or fraction thereof: *Provided*, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of stock certificates as collateral security for money loaned thereon, which stock certificates are not actually sold, nor upon such stock certificates so deposited: *Provided further*, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts: *Provided further*, That in case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer of the certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered

by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. Any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons who shall make any such sale, or who shall in pursuance of any such sale deliver any stock or evidence of the sale of any stock or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto with intent to evade the foregoing provisions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both, at the discretion of the court.

5. Produce, sales of, on exchange: Upon each sale, agreement of sale, or agreement to sell, including so-called transferred or scratch sales, any products or merchandise at any exchange, or board of trade, or other similar place, for future delivery, for each $100 in value of the merchandise covered by said sale or agreement of sale or agreement to sell, 2 cents, and for each additional $100 or fractional part thereof in excess of $100, 2 cents: *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale: *Provided further*, That sellers of commodities described herein, having paid the tax provided by this subdivision, may transfer such contracts to a clearing house corporation or association, and such transfer shall not be deemed to be a sale, or agreement of sale, or an agreement to sell within the provisions of this Act, provided that such transfer shall not vest any beneficial interest in such clearing house association but shall be made for the sole purpose of enabling such clearing house association to adjust and balance the accounts of the members of said clearing house association on their several contracts. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver, any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000, or be imprisoned not more than six months, or both, at the discretion of the court.

That no bill, memorandum, agreement, or other evidence of such

sale, or agreement of sale, or agreement to sell, in case of cash sales of products or merchandise for immediate or prompt delivery which in good faith are actually intended to be delivered shall be subject to this tax.

6. Drafts or checks payable otherwise than at sight or on demand, promissory notes, except bank notes issued for circulation, and for each renewal of the same, for a sum not exceeding $100, 2 cents; and for each additional $100 or fractional part thereof, 2 cents.

Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents: *Provided*, That nothing contained in this paragraph shall be so construed as to impose a tax upon any instrument or writing given to secure a debt.

8. Entry of any goods, wares, or merchandise at any customhouse, either for consumption or warehousing, not exceeding $100 in value, 25 cents; exceeding $100 and not exceeding $500 in value, 50 cents; exceeding $500 in value, $1.

9. Entry for the withdrawal of any goods or merchandise from customs bonded warehouse, 50 cents.

10. Passage ticket, one way or round trip, for each passenger, sold or issued in the United States for passage by any vessel to a port or place not in the United States, Canada, or Mexico, if costing not exceeding $30, $1; costing more than $30 and not exceeding $60, $3; costing more than $60, $5: *Provided*, That such passage tickets, costing $10 or less, shall be exempt from taxation.

11. Proxy for voting at any election for officers, or meeting for the transaction of business, of any incorporated company or association, except religious, educational, charitable, fraternal, or literary societies, or public cemeteries, 10 cents.

12. Power of attorney granting authority to do or perform some act for or in behalf of the grantor, which authority is not otherwise vested in the grantee, 25 cents: *Provided*, That no stamps shall be required upon any papers necessary to be used for the collection of claims from the United States or from any State for pensions, back pay, bounty, or for property lost in the military or naval service or upon powers of attorney required in bankruptcy cases.

13. Playing cards: Upon every pack of playing cards containing not more than fifty-four cards, manufactured or imported, and sold, or removed for consumption or sale, after the passage of this Act, a tax of 5 cents per pack in addition to the tax imposed under existing law,

14. Parcel-post packages: Upon every parcel or package transported from one point in the United States to another by parcel post on which the postage amounts to 25 cents or more, a tax of 1 cent for each 25 cents or fractional part thereof charged for such transportation, to be paid by the consignor.

No such parcel or package shall be transported until a stamp or stamps representing the tax due shall have been affixed thereto.

TITLE IX.—WAR ESTATE TAX.

(For the provision under this title imposing an additional tax on inheritances, that is, on estates, see *supra*, p. 988.

TITLE X.—ADMINISTRATIVE PROVISIONS.

Sec. 1000. That there shall be levied, collected, and paid in the United States, upon articles coming into the United States from the West Indian Islands acquired from Denmark, a tax equal to the internal-revenue tax imposed in the United States upon like articles of domestic manufacture; such articles shipped from said islands to the United States shall be exempt from the payment of any tax imposed by the internal-revenue laws of said islands: *Provided*, That there shall be levied, collected, and paid in said islands, upon articles imported from the United States, a tax equal to the internal-revenue tax imposed in said islands upon like articles there manufactured; and such articles going into said islands from the United States shall be exempt from payment of any tax imposed by the internal-revenue laws of the United States.

Sec. 1001. That all administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act, and every person, corporation, partnership, or association liable to any tax imposed by this Act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe.

Sec. 1002. That where additional taxes are imposed by this Act upon articles or commodities, upon which the tax imposed by existing law has been paid, the person, corporation, partnership, or association required by this Act to pay the tax shall, within thirty days after its passage, make return under oath in such form and under such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury shall prescribe. Payment of the tax shown to be due may be extended to a date not exceeding seven months from the passage of this Act, upon the filing of a bond for payment in such form and amount and with such sureties as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

Sec. 1003. That in all cases where the method of collecting the tax imposed by this Act is not specifically provided, the tax shall be collected in such manner as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury may prescribe. All administrative and penalty provisions of Title VIII of this Act, in so far as applicable, shall apply to the collection of any tax which the Commissioner of Internal Revenue determines or prescribes shall be paid by stamp.

Sec. 1004. That whoever fails to make any return required by this Act or the regulations made under authority thereof within the time prescribed or who makes any false or fraudulent return, and whoever evades or attempts to evade any tax imposed by this Act or fails to collect or truly to account for and pay over any such tax, shall be subject to a penalty of not more than $1,000, or to imprisonment for not more than one year, or both, at the discretion of the court, and in addition thereto a penalty of double the tax evaded, or not collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected, in any case in which the punishment is not otherwise specifically provided.

Sec. 1005. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

Sec. 1006. That where the rate of tax imposed by this Act, payable by stamps, is an increase over previously existing rates, stamps on hand in the collectors' offices and in the Bureau of Internal Revenue may continue to be used until the supply on hand is exhausted, but shall be sold and accounted for at the rates provided by this Act, and assessment shall be made against manufacturers and other taxpayers having such stamps on hand on the day this Act takes effect for the difference between the amount paid for such stamps and the tax due at the rates provided by this Act.

Sec. 1007. That (*a*) if any person, corporation, partnership, or association has prior to May ninth, nineteen hundred and seventeen, made a bona fide contract with a dealer for the sale, after the tax takes effect, of any article (or in the case of moving picture films, such a contract with a dealer, exchange, or exhibitor, for the sale or lease thereof) upon which a tax is imposed under Title III, IV, or VI, or under subdivision thirteen of Schedule A of Title VIII, or under this section, and (*b*) if such contract does not permit the adding of the whole of such tax to the amount to be paid under such contract, then the vendee or lessee shall, in lieu of the vendor, or lessor, pay so much of such tax as is not so permitted to be added to the contract price.

The taxes payable by the vendee or lessee under this section shall be paid to the vendor or lessor at the time the sale or lease is consummated, and collected, returned, and paid to the United States by

such vendor or lessor in the same manner as provided in section five hundred and three.

The term "dealer" as used in this section includes a vendee who purchases any article with intent to use it in the manufacture or production of another article intended for sale.

Sec. 1008. That in the payment of any tax under this Act not payable by stamp a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

Sec. 1009. That the Secretary of the Treasury, under rules and regulations prescribed by him, shall permit taxpayers liable to income and excess profits taxes to make payments in advance in installments or in whole of an amount not in excess of the estimated taxes which will be due from them, and upon determination of the taxes actually due any amount paid in excess shall be refunded as taxes erroneously collected: *Provided*, That when payment is made in installments at least one-fourth of such estimated tax shall be paid before the expiration of thirty days after the close of the taxable year, at least an additional one-fourth within two months after the close of the taxable year, at least an additional one-fourth within four months after the close of the taxable year, and the remainder of the tax due on or before the time now fixed by law for such payment: *Provided further*, That the Secretary of the Treasury, under rules and regulations prescribed by him, may allow credit against such taxes so paid in advance of an amount not exceeding three per centum per annum calculated upon the amount so paid from the date of such payment to the date now fixed by law for such payment; but no such credit shall be allowed on payments in excess of taxes determined to be due, nor on payments made after the expiration of four and one-half months after the close of the taxable year. All penalties provided by existing law for failure to pay tax when due are hereby made applicable to any failure to pay the tax at the time or times required in this section.

Sec. 1010. That, under rules and regulations prescribed by the Secretary of the Treasury, Collectors of Internal Revenue may receive, at par and accrued interest, certificates of indebtedness issued under section six of the Act entitled "An Act to authorize an issue of bonds to meet expenditures for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments, and for other purposes," approved April twenty-fourth, nineteen hundred and seventeen, and any subsequent Act or Acts, and uncertified checks in payment of income and excess profits taxes, during such time and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; but if a check so received is not paid by the bank on which it is drawn the person by whom such check has been tendered shall remain liable for the payment of the tax and for all legal penalties and additions the same as if such check had not been tendered.

TITLE IX.—POSTAL RATES.

Sec. 1100. That the rate of postage on all mail matter of the first class, except postal cards, shall, thirty days after the passage of this Act be, in addition to the existing rate, 1 cent for each ounce or fraction thereof: *Provided*, That the rate of postage on drop letters of the first class shall be 2 cents an ounce or fraction thereof. Postal cards, and private mailing or post cards when complying with the requirements of existing law, shall be transmitted through the mails at 1 cent each in addition to the existing rate.

That letters written and mailed by soldiers, sailors, and marines assigned to duty in a foreign country engaged in the present war may be mailed free of postage, subject to such rules and regulations as may be prescribed by the Postmaster General.

Sec. 1101. That on and after July first, nineteen hundred and eighteen, the rates of postage on publications entered as second class matter (including sample copies to the extent of ten per centum of the weight of copies mailed to subscribers during the calendar year) when sent by the publisher thereof from the post office of publication or other post office, or when sent by a news agent to actual subscribers thereto, or to other news agents for the purpose of sale:

(*a*) In the case of the portion of such publication devoted to matter other than advertisements, shall be as follows: (1) on and after July first, nineteen hundred and eighteen, and until July first, nineteen hundred and nineteen, 1¼ cents per pound or fraction thereof; (2) on and after July first, nineteen hundred and nineteen, 1½ cents per pound or fraction thereof;

(*b*) In the case of the portion of such publication devoted to advertisements the rates per pound or fraction thereof for delivery within the several zones applicable to fourth-class matter shall be as follows (but where the space devoted to advertisements does not exceed five per centum of the total space, the rate of postage shall be the same as if the whole of such publication was devoted to matter other than advertisements): (1) on and after July first, nineteen hundred and eighteen, and until July first, nineteen hundred and nineteen, for the first and second zones, 1¼ cents; for the third zone, 1½ cents; for the fourth zone, 2 cents; for the fifth zone, 2¼ cents; for the sixth zone, 2½ cents; for the seventh zone, 3 cents; for the eighth zone, 3¼ cents; (2) on and after July first, nineteen hundred and nineteen, and until July first, nineteen hundred and twenty, for the first and second zones, 1½ cents; for the third zone, 2 cents; for the fourth zone, 3 cents; for the fifth zone 3½ cents; for the sixth zone, 4 cents; for the seventh zone, 5 cents; for the eighth zone, 5½ cents; (3) on and after July first, nineteen hundred and twenty and until July first, nineteen hundred and twenty-one, for the first and second zones, 1¾ cents; for the third zone, 2½ cents; for the fourth zone, 4 cents; for the fifth zone, 4¾ cents; for the sixth zone, 5½ cents; for the seventh zone, 7 cents; for the eighth zone, 7¾ cents; (4) on and after July first, nineteen hundred and twenty-one, for the first and second zones, 2 cents; for the third zone, 3 cents; for the fourth zone,

5 cents; for the fifth zone, 6 cents; for the sixth zone, 7 cents; for the seventh zone, 9 cents; for the eighth zone, 10 cents;

(*c*) With the first mailing of each issue of each such publication, the publisher shall file with the postmaster a copy of such issue, together with a statement containing such information as the Postmaster General may prescribe for determining the postage chargeable thereon.

Sec. 1102. That the rate of postage on daily newspapers, when the same are deposited in a letter carrier office for delivery by its carriers, shall be the same as now provided by law; and nothing in this title shall affect existing law as to free circulation and existing rates on second-class mail matter within the county of publication: *Provided*, That the Postmaster General may hereafter require publishers to separate or make up to zones in such a manner as he may direct all mail matter of the second class when offered for mailing.

Sec. 1103. That in the case of newspapers and periodicals entitled to be entered as second-class matter and maintained by and in the interest of religious, educational, scientific, philanthropic, agricultural, labor, or fraternal organizations or associations, not organized for profit and none of the net income of which inures to the benefit of any private stockholder or individual, the second-class postage rates shall be, irrespective of the zone in which delivered (except when the same are deposited in a letter-carrier office for delivery by its carriers, in which case the rates shall be the same as now provided by law), 1⅛ cents a pound or fraction thereof on and after July first, nineteen hundred and eighteen, and until July first, nineteen hundred and nineteen, and on and after July first, nineteen hundred and nineteen, 1¼ cents a pound or fraction thereof. The publishers of such newspapers or periodicals before being entitled to the foregoing rates shall furnish to the Postmaster General, at such times and under such conditions as he may prescribe, satisfactory evidence that none of the net income of such organization inures to the benefit of any private stockholder or individual.

Sec. 1104. That where the total weight of any one edition or issue of any publication mailed to any one zone does not exceed one pound the rate of postage shall be 1 cent.

Sec. 1105. The zone rates provided by this title shall relate to the entire bulk mailed to any one zone and not to individually addressed packages.

Sec. 1106. That where a newspaper or periodical is mailed by other than the publisher or his agent or a news agent or dealer, the rate shall be the same as now provided by law.

Sec. 1107. That the Postmaster General, on or before the tenth day of each month, shall pay into the general fund of the Treasury an amount equal to the difference between the estimated amount received during the preceding month for the transportation of first class matter through the mails and the estimated amount which would have been received under the provisions of the law in force at the time of the passage of this Act.

Sec. 1108. That the salaries of postmasters at offices of the first, second, and third classes shall not be increased after July first, nineteen hundred and seventeen, during the existence of the present war. The compensation of postmasters at offices of the fourth class shall continue to be computed on the basis of the present rates of postage.

Sec. 1109. That where postmasters at offices of the third class have been since May first, nineteen hundred and seventeen, or hereafter are granted leave without pay for military purposes, the Postmaster General may allow, in addition to the maximum amounts which may now be allowed such offices for clerk hire, in accordance with law an amount not to exceed fifty per centum of the salary of the postmaster.

Sec. 1110. That section five of the Act approved March third, nineteen hundred and seventeen, entitled "An Act making appropriations for the Post Office Department for the year ending June thirtieth, nineteen hundred and eighteen," shall not be construed to apply to ethyl alcohol for governmental, scientific, medicinal, mechanical, manufacturing and industrial purposes, and the Postmaster General shall prescribe suitable rules and regulations to carry into effect this section in connection with the Act of which it is amendatory, nor shall said section be held to prohibit the use of the mails by regularly ordained ministers of religion; or by officers of regularly established churches, for ordering wines for sacramental uses, or by manufacturers and dealers for quoting and billing such wines for such purposes only.

TITLE XII.—Income Tax Amendments.

For the provisions of this title amending certain sections of the Income Tax Act and adding certain other sections, see the corresponding sections of the Income Tax, *supra*, p. 953.

TITLE XIII.—General Provisions.

Sec. 1300. That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of said Act, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in controversy in which such judgment shall have been rendered.

Sec. 1301. Title I of the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the army and navy and the extension of fortifications, and for other purposes, approved March 3, 1917, be, and the same is hereby, repealed.

Sec. 1302. That unless otherwise herein specially provided, this Act shall take effect on the day following its passage.

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State tax system of, Appendix, p. 943.